80-965

No.

Supreme Court, U. S.
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IN THE

United States Supreme Court

OCTOBER TERM, 1980

TEXACO, INC., ROBERT BRASELTON, ELECTRA FIELDS, CHARLES BRASELTON, CHESTER BRASELTON, ROBERT E. BRASELTON, CLIFFORD N. BRASELTON, OSBORNE T. BRASELTON, JR., DAVID E. BURKHART, JOHN P. BRASELTON, ROSA G. BURKHART, D. W. MAYHEW, d/b/a MAYHEW OIL AND GAS DEVELOPMENT,

Appellants,

vs.

LOUISE F. SHORT,

Appellee,

STATE OF INDIANA,

Intervenor.

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED BY THE APPEAL

This is an appeal of the decision of the Supreme Court of Indiana in holding the Dormant Mineral Interests Act, (also known as the Indiana Mineral Lapse Act) Indiana Code 32-5-11-1, et seq. to be constitutional where the Act provides that a mineral interest severed from the surface ownership is deemed extinguished if use of the mineral interest is not made within twenty (20) years or a statement of claim setting forth the ownership is not filed in the county recorder's office.

1. **Due Process.**

Does the Dormant Mineral Interests Act of the State of Indiana (Indiana Code 32-5-11-1 *et seq.)* violate the United States Consitution as to the Fourteenth Amendment by depriving landowners of their property without due process of law, in that non-use of a mineral right for twenty (20) years under the Act purports to extinguish the right without any notice or hearing?

2. **Equal Protection.**

Does the Dormant Mineral Interests Act of the State of Indiana (Indiana Code 32-5-11-1 *et seq.)* violate the United States Constitution as to the Fourteenth Amendment by denying certain persons of the equal protection of the law when it provides that the owners of ten or more mineral interests in a county who inadvertently fail to file a statement of claim must be given written notice and a chance to file their claim prior to extinguishment of their interest when similar treatment is not afforded to those having less than 10 mineral interests.

3. **Impairment of Contract.**

Does the Dorman Mineral Interests Act of the State of Indiana (Indiana Code 32-5-11-1 *et seq.)* violate the United States Constitution as to Article 1, Section 10, by unreasonably im-

pairing the obligations of contracts in that it purports to terminate a contract right without consent or action of the parties?

4. **Just Compensation.**

Does the Dormant Mineral Interests Act of the State of Indiana (Indiana Code 32-5-11-1) violate the United States Constitution as to Section 1 of the Fourteenth Amendment by the taking of private property without any compensation when mineral rights are extinguished after 20 years of non-use.

PARTIES TO THE PROCEEDING

All parties to the proceeding are listed in the caption of the case in this court. DeBeers Diamond Investment Ltd. was named a party below but a stipulation filed in the trial court shows they have no interest and are not a party before this Court. There is a companion (but not consolidated) case raising the same issues in the Supreme Court of Indiana, No. 1278S303, in which Ulysses G. Walden, Jr. and Carolyn Sallee Walden were Appellants and Eden H. Pond, Edna H. Bobe and Consolidation Coal Company were Appellees. This appeal attacks the constitutionality of the Indiana Dormant Mineral Act on behalf of oil and gas interest holders. The Walden case attacks the same act on behalf of coal interest holders. The Supreme Court of Indiana made no distinction between the two interests, holding both to be vested property interests.

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Appellants,

vs.

LOUISE F. SHORT,

Appellee,

STATE OF INDIANA,

Intervenor.

JURISDICTIONAL STATEMENT

OPINION OF THE COURT BELOW

The opinion of the Supreme Court of Indiana which appears in the Appendix herein, (page A-1) is reported at 406 NE 2d 625. It is not yet published in the official Indiana Reports. The opinion of the Gibson Circuit Court appears in the Appendix herein (page A-14).

GROUNDS OF JURISDICTION

This is a direct appeal from the decision of the Supreme Court of Indiana (the highest court of the State) holding the Indiana Dormant Minerals Interests Act (Indiana Code 32-5-11-1) to be constitutional under the United States Constitution. Jurisdiction of this Court is founded on 28 U.S.C. §1257(2). Judgment was entered by the Gibson Circuit Court on September 18, 1978. The Indiana Supreme Court rendered its decision on June 23, 1980. A timely petition for rehearing was filed and it was denied by the Supreme Court of Indiana on September 24, 1980. Notice of Appeal to the Supreme Court of the United States was filed with the Supreme Court of Indiana on November 17, 1980. (Appendix, page A-28)

28 U.S.C. §1257(2) reads as follows:

> "Final judgments or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> "(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity."

CONSTITUTIONAL PROVISIONS

Constitution of the United States of America

Fourteenth Amendment, Section 1:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Section 10, Clause 1:

> "No state shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make anything but gold and silver coin a tender in payment of debts; pass any bill of altainer, ex post facto law, or law impairing the obligation of contracts, or grant any title of nobility."

STATEMENT OF FACTS

In Indiana and in many of the states there are many instances where the ownership of minerals (such as coal, oil or gas) underlying property is in the hands of persons other than those who own the surface of such property. In some instances these mineral rights have not been used for many years.

In an apparent effort to solve a perceived problem, Indiana in 1971 passed the INDIANA DORMANT MINERAL INTERESTS ACT (I.C. 32-5-11) (also known as the Indiana Mineral Lapse Act) (Hereafter referred to as the Act) (Set forth in full text at Appendix F).

The Act provides:

32-5-11-1 [46-1808]. Lapse of mineral interest—Prevention.—Any interest in coal, oil and gas, and other minerals, shall, if unused for a period of 20 years, be extinguished, unless a statement of claim is filed in accordance with section five [32-5-11-5] hereof, and the ownership shall revert to the then owner of the interest out of which it was carved. [IC 32-5-11-1, as added by Acts 1971, P.L. 423, § 1.]

32-5-11-2 [46-1809]. Mineral interest—Definition.—A mineral interest shall be taken to mean the interest which is created by an instrument transferring, either by grant, assignment, or reservation, or otherwise an interest, of any kind, in coal, oil and gas, and other minerals. [IC 32-5-11-2, as added by Acts 1971, P.L. 423, § 1.]

32-5-11-3 [46-1810]. Use of mineral interests—Definition.—A Mineral interest shall be deemed to be used when there are any minerals produced thereunder or when operations are being conducted thereon for injection, withdrawal, storage or disposal of water, gas or other fluid substances, or when rentals or royalties are being paid by the owner thereof for the purpose of delaying or enjoying the use or exercise of such rights or when any such use is being carried out on any tract with which such mineral interest may be unitized or pooled for production purposes, or when, in the case of coal or other solid minerals, there is production from a common vein or seam by the owners of such mineral interests, or when taxes are paid on such mineral interest by the owner thereof. Any use pursuant to or authorized by the instrument creating such mineral interest shall be effective to continue in force all right granted by such instrument. [IC 1971, 32-5-11-3, as added by Acts 1971, P.L. 423, § 1, p. 1970.]

32-5-11-4 [46-1811]. Statement of claim—Filing—Requirements.—The statement of claim provided in section one [32-5-11-1] above shall be filed by the owner of the mineral interest prior to the end of the twenty [20] year period set forth in section two [one] [32-5-11-1] or within two [2] years after the effective date [September 2, 1971] of this act, whichever is later, and shall contain the name and address of the owner of such interest, and description of the land, on or under which such mineral interest is located. Such statement of claim shall be filed in the office of the recorder of deeds in the county in which such land is located. Upon the filing of the statement of claim within the time provided, it shall be deemed that such mineral interest was being used on the date the statement of claim was filed. [IC 1971, 32-5-11-4, as added by Acts 1971, P. L. 423, § 1, p. 1970; 1972, P. L. 11, § 15, p. 336.]

32-5-11-5 [46-1812]. Extinguishment of mineral interest—Exceptions.—Failure to file a statement of claim within the time

provided in section 4 [32-5-11-4] shall not cause a mineral interest to be extinguished if the owner of such mineral interest:

(1) was at the time of the expiration of the period provided in section four [32-5-11-4], the owner of ten [10] or more mineral interests, as above defined, in the county in which such mineral interest is located, and;

(2) made diligent effort to preserve all of such interests as were not being used, and did within a period of ten [10] years prior to the expiration of the period provided in section 4 [32-5-11-4] preserve other mineral intersets, in said county, by the filing of statements of claim as herein required, and;

(3) failed to preserve such interest through inadvertence, and;

(4) filed the statement of claim herein required, within sixty [60] days after publication of notice as provided in section seven [32-5-11-7] herein, if such notice is published, and if no such notice is publied, within sixty [60] days after receiving actual knowledge that such mineral interest had lapsed. [IC 1971, 32-5-11-5, as added by Acts 1971, P. L. 423, § 1, p. 1970.]

32-5-11-6 [46-1813]. Successor in interest—Notice requirements—Prima facie evidence.—Any person who will succeed to the ownership of any mineral interest, upon the lapse thereof, may give notice of the lapse of such mineral interest by publishing the same in a newspaper of general circulation in the county in which such mineral interest is located, and, if the address of such mineral interest owner is shown of record or can be determined upon reasonable inquiry, by mailing within ten [10] days after such publication a copy of such notice to the owner of such mineral interest. The notice shall state the name of the owner of such mineral interest, as shown of record, a description of the land, and the name of the person giving such notice. If a copy of such notice, together with an affidavit of service thereof, shall be promptly filed in the office of the recorder of deeds in the county wherein such land is located, the

record thereof shall be prima facie evidence, in any legal proceedings, that such notice was given. [IC 1971, 32-5-11-6, as added by Acts 1971, P. L. 423, § 1, p. 1970.]

32-5-11-7 [46-1814]. Statement of claim—Filing—Recorder's duty.—Upon the filing of the statement of claim, provided for in section 4 [32-5-11-4] of this chapter or the proof of service of notice as provided in section seven [six] [32-5-11-6] of this chapter in the recorder's office for the county where such interest is located, the recorder shall record the same in a book to be kept for that purpose, which shall be known as the "Dormant Mineral Interest Record" and shall indicate by marginal notation on the instrument creating the original mineral interest the filing of the statement of claim or affidavit of publication and service of notice. [IC 1971, 32-5-11-7, as added by Acts 1971, P. L. 423, § 1, p. 1970.]

32-5-11-8 [46-1815]. Waiver of chapter's provisions—Time limit.—The provisions of this chapter [32-5-11-1—32-5-11-8] may not be waived at any time prior to the expiration of the twenty [20] year period provided in section 1 [32-5-11-1]. [IC 1971, 32-5-11-8, as added by Acts 1971, P. L. 423, § 1, p. 1970.]

Appellants are the owners of fractional undivided interests in oil, gas and other minerals underlying a tract of land in Gibson County, Indiana (the mineral interests). Appellee is the owner of the surface of such land. No use was made of the mineral interests for twenty (20) years immediately preceding September 2, 1971 (the effective date of the Indiana Dormant Mineral Interests Act [I.C. 32-5-11] [the Act]) nor for the two years following. At no time during the two year period were Appellants the owners of ten or more mineral interests in Gibson County, Indiana. Further Appellants did not file any statement of claim within the two year grace period provided by the Act.

Thereafter, Appellee surface owner filed an action for declaratory judgment with the Gibson Circuit Court against the

mineral interest owners praying that the mineral interest claimed by the Appellants be declared extinguished under the Act. Appellants filed answer claiming the Act to be unconstitutional under the Indiana and United States Constitutions. The matter was heard by the trial court based upon a stipulation where the only issue before the Court was the Constitutionality of the Act under both the Constitution of Indiana and the Constitution of the United States.

The trial court by written opinion (Appendix B) held the Act unconstitutional under the Fifth and Fourteenth Amendments to the United States Constitution. On appeal the Supreme Court of Indiana held the Act constitutional under both the Indiana and United States Constitutions (Appendix A). The sole question before this Court is the constitutionality of the Act under the United States Constitution.

Indiana has held, in the opinion of the Indiana Supreme Court in this case, (Appendix A) that:

> "Interest of estates in oil, gas, coal and other minerals lying beneath the surface of the land are interests in real estate for our purposes here, and as such are entitled beyond question to the protection of the Constitution from irrational state action. They are vested property interests separate and distinct from the surface ownership. The State has no power to deprive an owner of such an interest without due process of law. They are entitled to the same protection as are fee simple titles."

Given a vested property right, can a State by legislation constitutionally determine that because the use of the mineral right was dormant for twenty years, the ownership of the mineral interests shall revert to the surface owner, without providing notice or opportunity for hearing prior to the extinguishment of the property right? Does this not violate the Fourteenth Amendment of due process and Article 1, Section 10 on impairment of contracts?

QUESTION IS SUBSTANTIAL

1. **Due Process.** The question is clear cut. Does the Act violate the procedural due process clause of the United States Constitution? The States of Illinois, Minnesota, Michigan and Wisconsin have passed similar laws and in each instance the Supreme Court of the respective State has held the Act unconstitutional as violating the United States Constitution. These cases are as follows:

Wilson v. *Bishop,* (1980, Ill.) ____NE 2d____ (Appendix I)

Wheelock v. *Heath,* (1978) 201 Neb 835, 272 NW 2d 768 (Appendix J)

Chicago & North Western Transportation Co. v. *Paderson,* (1977) 80 Wis 2d 566, 259 NW 2d 316 (Appendix G)

Contos v. *Herbst,* (Minn 1979) 278 NW 2d 732 (Appendix H)

Thus, the decision of the Supreme Court of Indiana is in conflict with the decisions of the court of last resort of four other states. This in itself raises a fundamental question of equality of constitutional treatment among the several states.

The Illinois statute is almost identical to the Indiana statute and that statute was held unconstitutional under the United States Constitution by the Illinois Supreme Court in *Wilson* v. *Bishop,* (1980 Ill) ____NE 2d____. The opinion is set forth in full at Appendix I. There the Court held:

> "The United States Supreme Court has emphasized that due process of law, at a minimum prohibits the deprivation of property without providing notice and an opportunity for a hearing appropriate to the nature of the case. [*Memphis Light, Gas & Water Division* v. *Craft,* (1978), 436 U.S. 1 13-16, 56 L.Ed. 2d 30, 41-43, 98 S.Ct. 1554, 1562-63; *Mullane* v. *Central Hanover Trust Co.,* (1950), 339 U.S. 306, 313, 94 L.Ed. 865, 872-73, 70 S.Ct. 652,

> 657]..."The statute provided no notice of any kind to record owners of oil and gas interests that they must record a statement of their interest in order to prevent the forfeiture of their property interests...Failure to provide those owners with adequate notice and an opportunity to be heard renders the statutory scheme unconstitutional."

The basic question presented is whether the Act denies basic constitutional rights under the banner of a perceived public interest. In *Sniadach* v. *Family Finance Corporation of Bayview,* (1969) 395 U.S. 337, 23 L.Ed. 2d 349, 89A S.Ct. 1820, this Court said: "The question is not whether the Wisconsin law is a wise law or an unwise law. Our concern is not what philosophy Wisconsin should or should not embrace."

The Indiana decision, if left standing, states an erroneous view of Constitutional requirements relating to procedural due process. The court below says that the Act is "self executing" and "does not contemplate an adjudication before a tribunal before the lapse occurs". From that it reasons that due process does not require notice and opportunity for hearing before the lapse occurs. Such reasoning is directly contrary to *Mullane* v. *Central Hanover Bank and Trust Company,* (1950) 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed 865, where this Court held:

> "The fundamental requisite of due process of law is the opportunity to be heard."

In *Memphis Light, Gas & Water Division* v. *Croft,* (1978) 436 U.S. 1, 56 L.Ed.2d 30, 98 S.Ct. 1554, this Court said:

> "This Court consistently has held that some kind of hearing is required at some time before a person is finally deprived of his property interest."

In *Sniadach* v. *Family Finance Corporation of Bayview, supra,* this Court held that a prejudgment garnishment of wages is unconstitutional "where the taking of one's property is so ob-

vious that it needs no extended argument to conclude that absent notice and prior hearing this prejudgment garnishment procedure violates the fundamental principles of due process."

In *Fuentes* v. *Shevin,* (1972) 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed.2d 556, this court struck down the Florida and Pennsylvania prejudgment replevin statutes, holding, inter alia, that the statutes violated the procedural due process clause because there was no hearing before the seizure of property. This Court, speaking through Justice Stewart said (at 401 U.S. 83):

> "The right to a prior hearing has long been recognized by this Court under the Fourteenth and Fifth Amendments. Although the Court has held that due process tolerates variances in the *form* of a hearing 'appropriate to the nature of the case', *Mullane* v. *Central Hanover Trust Co.,* . . . and 'depending upon the importance of the interests involved and the nature of the subsequent proceedings (if any)' . . . the Court has traditionally insisted that, whatever its form, opportunity for that hearing must be provided before the deprivation at issue takes effect."

The Indiana decision completely misreads *Anderson National Bank* v. *Luckett,* (1944) 321 U.S. 233, 64 S.Ct. 599, 88 L.Ed. 692, when it cites that case as authority to support the Act under procedural due process. In *Anderson* the requirement of notice and opportunity to be heard was fully afforded to the dormant account holder. There was no forfeiture of the account holder's rights as here. The Kentucky act in *Anderson* merely transferred the dormant accounts from the Bank to the State. The rights of the account owner to the account were fully preserved in the hands of the State. The *Anderson* decision was the only case cited by the Court on procedural due process.

This case raises the question of whether or not the passage of the Act itself and its presumption that everyone knows the law is sufficient to satisfy the notice requirement of procedural due process. This Court has consistently said that to satisfy pro-

cedural due process the notice has to be reasonably calculated to apprise interested parties of the contemplated action. *Mullane* v. *Central Hanover Bank & Trust Co., supra.*

On the question of procedural due process, the decision of the Indiana Supreme Court in this case is in direct conflict with at least four other state courts on the same issue and is in conflict with the decisions of this court on an important federal question.

2. **Equal Protection.** Section Five of the Act provides that failure to file a statement of claim shall not cause a mineral interest to be extinguished if the owner of ten or more interests failed to do so by inadvertance after having filed a statement of claim as to other mineral interests. This section is unique to Indiana and is not found in the statutes of other states.

The section raises the question: Can a state constitutionally excuse one property owner from inadvertance in filing a claim because the property owner has more than nine mineral interests when it does not excuse property owners having nine or less interests? Does this not violate the equal protection clause of the Fourteenth Amendment?

It is submitted that this is arbitrary discrimination based on number of holdings. It can be explained only by realizing that the lobbists for the larger mineral interest holders were able to protect themselves while the smaller holders could not. The Act treats persons of the same class differently in violation of the equal protection clause. *Ohio* v. *Dollison* (1904) 194 US 447, 48 L.Ed. 1062.

Notice further that this section provides a statutory scheme for giving actual notice to the holder of ten or more interests and if he fails within sixty (60) days after actual notice to file his statement of claim the interest lapses. Thus, the statute provides a scheme or method of complying with the notice requirements of due process as to the holders of ten or more interests but does

not afford the same due process rights as to the holders of lesser interests. This is invidious discrimination on a fundamental constitutional right.

3. **Impairment of Contract.** The rights of mineral interests holders arises out of a deed or other document of conveyance. Such right thus arises out of contract. The effect of the Act is to destroy that contract right. Under the Act the right is not only impaired it is extinguished. The consequence of such destruction is to take a property right from the mineral interest holder and give it to the surface interest holder. We say that state action violates the Contract Clause of Article 1, Section 10 of the U.S. Constitution.

The ruling of the Supreme Court of Indiana is contrary to the decisions of this Court in *Home Building and Loan Association* v. *Blaisdell* (1934), 290 U.S. 438 54 S.Ct. 231, 78 L.Ed. 413 and *United States Trust Co. of New York* v. *New Jersey* (1977) 431 U.S. 1 97 S.Ct. 1505, 52 L.Ed 2d 92. In *Home Building and Loan Association,* this Court held:

> "The obligations of a contract are impaired by a law which renders them invalid or releases or extinguishes them."

In the *United States Trust Co. of New York, supra,* the Court, speaking through Mr. Justice Blackmun held that the contract clause limits the power of the states to regulate contracts between private parties. Admittedly, the absoluteness of the contract clause is tempered by the police power of the several states. But even the police power has its limitations. In *United States Trust Co. of New York, supra,* the Court said that a State is not free to impose a drastic impairment of contract when an evident and more moderate course would serve its purposes equally well. Here the action of the state was draconian. It provided for immediate and absolute extinguishment. Had the state required the giving of notice and an opportunity

for a mineral interest owner to have protected his right, the interests of the State would have been equally served and the Constitutional mandate satisfied.

4. **Just Compensation.** The Act has the effect of extinguishing a vested property right but in doing so it is taking private property from one person and giving it to the surface owner all without any compensation. This violates the just compensation provision of Section 1 of the Fourteenth Amendment. See *Wheelock* v. *Heath, supra* (appendix j); *Chicago & Northwestern Transportation Co.* v. *Paderson, supra* (appendix f); and, *Contos* v. *Herbst, supra* (appendix g). See also *Fuentes* v. *Shevin, supra.*

CONCLUSION

This case presents an important constitutional issue. It is clean cut, as there are no collateral facts to be weighed, the sole question being the constitutionality of the Act on its face. Four other state courts dealing with similar acts have held them invalid on Federal Constitutional grounds. The citizens of Indiana are entitled to the same protection of the same Federal Constitution.

For these reasons, this Court should note probable jurisdiction of this appeal.

Respectfully submitted,

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APPENDIX

APPENDIX

Appendix A

Opinion of the Supreme Court of Indiana A-1

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APPENDIX A

(Opinion of the Supreme Court of Indiana)

Short v. Texaco, Inc.
Cite as, Ind., 406 N.E.2d 625

Louise F. SHORT, Appellant,

v.

TEXACO, INC., Robert Braselton, Electra Fields, Charles Braselton, Chester Braselton, Robert E. Braselton, Clifford N. Braselton, Osborne T. Braselton, Jr., David E. Burkhart, John P. Braselton, Rosa G. Burkhart, D. W. Mayhew d/b/a Mayhew Oil and Gas Development, DeBeers Diamond Investment, Ltd., Appellaees,

State of Indiana, Intervenor.

Ulysses G. WALDEN, Jr. and Carolyn Sallee Walden, Appellants,

v.

Eden H. POND, Edna H. Bobe and Consolidation Coal Company, Appellees,

Louise F. Short, Intervenor.

Nos. 179S23 and 1278S303.

Supreme Court of Indiana.

June 23, 1980.

DeBRULER, Justice.

The trial court declared Ind.Code §§ 32-5-11-1 through 32-5-11-8, the Mineral Lapse Act, unconstitutional. The Act puts an end to interests in coal, oil, gas or other minerals which have not been used for twenty years. The "use" of a mineral in-

terest which continues it in force includes actual production, payment of rents, royalties or taxes, or the filing of a claim in the dormant mineral interest record in the recorder's office. It granted owners of mineral interests a two year period of grace after its effective date in which to file the claim and preserve the interest. This is an appeal from two judgments below, consolidated here, that termination of an interest under the Act is contrary to due process, equal protection, and the guarantee of just compensation for property taken by the State.

The Act reflects the legislative belief that the existence of a mineral interest about which there has been no display of activity or interest by the owners thereof for a period of twenty years or more is mischievous and contrary to the economic interests and welfare of the public. The existence of such stale and abandoned interests creates uncertainties in titles and constitutes an impediment to the development of the mineral interests that may be present and to the development of the surface rights as well. The Act removes this impediment by returning the severed mineral estate to the surface rights owner. There is a decided public interest to be served when this occurs. The extinguishment of such an interest makes the entire productive potential of the property again available for human use.

The trial court concluded that the legislative purpose of the Act is to facilitate the exploitation of energy sources and accepted such purpose as legitimate. While all its conclusions are not entirely clear, it went on to void the entire statute because it determined among other things that due process of law required the divestiture of the vested mineral interest to be preceded by due process notice and an opportunity to be heard.

[1] Interests or estates in oil, gas, coal and other minerals lying beneath the surface of the land are interests in real estate for our purposes here, and as such are entitled beyond question to the firmest protection of the Constitution from irrational state action. They are vested property interests separate and distinct

from the surface ownership. The State has no power to deprive an owner of such an interest without due process of law. They are entitled to the same protection as are fee simple titles. They are themselves of great utility and benefit to the society as a means of facilitating the development of natural resources.

[2] Courts of this state and nation have always given due regard to constitutional constraints upon their authority to void statutes. In doing so in *Noel* v. *Ewing*, (1857) 9 Ind. 37, we said:

> "It is due from the judiciary to sustain and reconcile their enactments, if possible. We will not lightly conclude that the law-making power has either ignorantly or wilfully violated the constitution. To justify the Courts in declaring an act voide, it must clearly subversive of that instrument. (Citations omitted.)
>
> They who claim that the legislature has, in this particular, transcended its constitutional power, should be prepared to make a strong and clear case. All doubts must fall in favor of the validity of the law." 9 Ind. at 43.

We reaffirm again now in this case our adherence to this vital principle.

In *Chicago and North Western Transportation Co.* v. *Pedersen*, (1977) 80 Wis.2d 566, 259 N.W.2d 316, the Supreme Court of Wisconsin voided a similar act which directed that mineral rights revert to the surface fee ownership if they were not registered or taxes had not been paid on them. That statute was deemed contrary to procedural due process in that the mineral interest owner was not given notice or an opportunity to be heard prior to the reversion of his interest to the surface rights owner. That court relied upon *Mullane* v. *Central Hanover Bank & Trust Co.*, (1950) 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865, and *Bell* v. *Burson*, (1971) 402 U.S. 535, 91 S.Ct. 1586, 29 L.Ed.2d 90. The court below took the same tack in voiding the Indiana Act.

In *Mullane, supra,* primarily relied upon by the trial court, the United States Supreme Court said:

> "Many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case.
>
> * * * * * *
>
> An elementary and fundamental requirement of due process *in any proceeding* which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." (Emphasis added.) 339 U.S. at 313, 314, 70 S.Ct. at 656, 657.

In *Mullane* the bank petitioned a court for settlement of an account of a trust fund, and the sufficiency of publication notice to beneficiaries was the issue. Notice was due to the beneficiaries because a tribunal was about to adjudicate upon their property. The Mineral Lapse Act in contrast is self-executing and does not contemplate an adjudication before a tribunal before a lapse occurs. When the statutory conditions exist the lapse occurs. *Mullane* does not support the trial court conclusion that notice and hearing are due to a mineral interest owner prior to the occurrence of an extinguishment.

Bell v. *Burson, supra,* relied upon by the trial court does not support the conclusion either. There a Georgia law provided that the drivers license of an individual motorist involved in an accident is to be automatically suspended without notice or hearing if security was not posted to cover the damages claimed by aggreived parties in the accident reports. In the course of

holding this system violative of procedural due process the court specifically noted:

> "If the statute barred the issuance of licenses to all motorists who did not carry liability insurance or who did not post security, the statute would not, under our cases, violate the Fourteenth Amendment. (Citations omitted.) It does not follow, however, that the amendment also permits the Georgia statutory scheme where not all motorists, but rather only motorists involved in accidents, are required to post security under penalty of loss of the licenses." 402 U.S. at 539, 91 S.Ct. at 1589.

Thus, even in *Bell,* a case involving a different complex of social concerns, there is this language supportive of the Act under consideration. It would support as consistent with procedural due process a legislative enactment which declared no more than that all licenses issued by the state would cease to be valid on a date certain in the future unless proof of financial responsibility were filed. Cf. *Frost & Frost Trucking Co.* v. *Railroad Commission,* (1926) 271 U.S. 583, 46 S.Ct. 605, 70 L.Ed. 1101. Such a hypothetical statute would be very similar in operation to the Act being questioned in this case.

[3] The Act under question does not provide for any adjudicatory process by a court or administrative agency. The absence of such a provision is not, we think, invalidating. The Act simply spells out the conditions which when existing mandate the extinguishment of an interest. If a court should be called upon to determine whether such conditions arose in a particular case so as to have effected the loss of an interest, the owner of such interest would be entitled to notice and an opportunity to be heard. Prior to any extinguishment the owner of an interest will have had notice by reason of the enactment itself of the conditions which would give rise to an extinguishment and at a minimum a two year opportunity to prevent those conditions from occurring by filing a statement of claim. *Anderson Na-*

tional Bank v. *Luckett,* (1944) 321 U.S. 233, 64 S.Ct. 599, 88 L.Ed. 692. That procedure is both simple and inexpensive. Based upon the foregoing analysis we do find the case of *Chicago & North Western Transportation Co.* v. *Pedersen, supra,* persuasive.

The reasoning of the trial court and the cases relied upon by it do not warrant the conclusion that the Act is unconstitutional because it fails to afford notice and hearing to mineral interest owners required by procedural due process.

[4,5] The trial court also concluded that the extinguishment of mineral interests under the Act constituted a taking of property without due process of law. Judge Young for the Fourth District Court of Appeals summarized the due process analysis applicable here in *Foreman* v. *State ex rel. Department of Natural Resources,* (1979) Ind. App., 387 N.E.2d 455:

> "The government has the inherent power or 'police power' to enact laws, within constitutional limits, to promote order, safety, health, morals, and the general welfare of society. . . . Property rights are not absolute and may be restricted by legislation which constitutes a proper exercise of the State's police power. . . . Legislation is a proper exercise of the police power when the collective benefit to the general public outweighs the restraint imposed. . . The methods or means used to protect the public order, health, morals, safety or welfare must have some reasonable relation to the purpose or end sought." 387 N.E.2d at 460.

Study of this Act reveals that its outstanding feature is its declaration that mineral interest are terminable. Whatever may be the exact legal dimensions of such interests, they are not greater than fee simple titles. Under the statute of limitations and the law of adverse possession a fee simple title to land is terminable. The Mineral Lapse Act can be viewed as vesting legal title in the owner of the surface rights which is free of the

mineral servitude when the conditions required by it exist. A statute of limitations vests legal title in an adverse possessor as against the true legal owner when the conditions required by it exist. *Brown* v. *Anderson,* (1883) 90 Ind. 93. Statutes of limitation are statutes of repose founded upon a rule of necessity and convenience and the well-being of society. *Chase Securities Corp.* v. *Donaldson,* (1945) 325 U.S. 304, 65 S.Ct. 1137, 89 L.Ed. 1628. This Act is also based upon the same rule. Cf. *Love* v. *Lynchburg National Bank and Trust Co.,* (1965) 205 Va. 860, 140 S.E.2d 650. We do not disregard the distinctions between the two types of statutes. The element of possession is different. No cause of action has arisen in the owner of the mineral interest which is required to be prosecuted. Given these differences and aforementioned similarities, we believe that this Act is, according to its principal intent and effect, and for the purpose of constitutional analysis, analogous to acts of limitation which vests title to real and personal property.

[6] Acts of limitation are not per se unconstitutional as impairing the obligation of contracts or as denying a person property without due process of law. This is so even though they extinguish the right of the party having a true title and vest a perfect title in the adverse holder. *Hawkins* v. *Barney's Lessee,* (1831) 5 Pet. 457, 8 L.Ed. 190, is an early case upholding the validity of a seven year limitation upon actions to recover possesion of land in Kentucky. In the course of that opinion it is said:

> "It is argued, that limitation laws although belonging to the lex fori, and applying immediately to the remedy, yet indirectly they effect a complete divesture and even transfer of right. This is unquestionably true, and yet in no wise fatal to the validity of this law. The right to appropriate a derelict is one of universal law, well known to the civil law, the common law, and all law; it existed in a state of nature, and is only modified by society, according to the discretion of each community."

The transfer of right upheld by the court was deemed the indirect product of the limitation law. The transfer or right effected by the Indiana Act under consideration is its direct product. That minor difference would not support a contrary evaluation of our Act.

[7,8] In *Terry* v. *Anderson,* (1877) 95 U.S. 628, 24 L.Ed. 365, Chief Justice Waite stated the general rule regarding the manner in which statutes of limitation are received by courts:

> "This court has often decided that statutes of limitation affecting existing rights are not unconstitutional, if a reasonable time is given for the comencement of an action before the bar takes effect. . . .
>
> In all such cases, the question is one of reasonableness, and we have, therefore, only to consider whether the time allowed in this statute is, under all the circumstances, reasonable. Of that the legislature is primarily the judge; and we cannot overrule the decision of that department of government, unless a palpable error has been committed." 95 U.S. at 632-633.

Indiana is in accord with the rule stated and the reasoning behind it. *Guthrie* v. *Wilson,* (1959) 240 Ind. 188, 162 N.E.2d 79; *Sansberry* v. *Hughes,* (1910) 174 Ind. 638, 92 N.E. 783. In *Terry* the court held that the period of nine months and seventeen days given to sue upon a cause of action was not unconstitutional. In *Turner* v. *People of State of New York,* (1897) 168 U.S. 90, 18 S.Ct. 38, 42 L.Ed. 392, a statute declaring that past sales and conveyances by a comptroller for nonpayment of taxes would be conclusively presumed regular six months after the effective day of the statute was upheld as providing a reasonable period for bringing an action. Pursuant to Ind.Code § 32-5-11-4, owners of mineral interests are granted a minimum of two years in which to act to preserve their interests. Such a period of grace would constitute a reasonable time as contemplated by these cases.

In *Wilson* v. *Iseminger,* (1902) 185 U.S. 55, 22 S.Ct. 573, 46 L.Ed. 804, the United States Supreme Court upheld a statute which barred actions to recover ground rents and extinguished totally the right to recover further such rents, after twenty-one years had expired during which no declaration or acknowledgment of the existence of the right or claim had been made. The statute provided that the bar and extinguishment would not be effective until three years after the passage of the act. The court held that the act gave a reasonable time to the owners of the ground rents for preserving their rights. This case strongly supports the validity of our Act, because it upheld a statute having an extinguishment feature similar to the Indiana Act under consideration.

[9] The purposes of this Act as stated above at the beginning of this opinion are to remedy uncertainties in titles and to facilitate the exploitation of energy sources and other valuable mineral resources. The dependence of local economies upon the mineral recovery industry and the entire State upon limited fossil fuel resources illustrates the public nature of these purposes. The objectives are valid and similar to those served by acts of limitation and the law of adverse possession. In limiting its incursion upon mineral rights to those which have been unused in the statutory sense for as long as twenty years, and in granting a two year period of grace after the enactment of the statute to preserve interests, the Legislature adopted means which are rationally related to such objectives, and which themselves provide a reasonable time and a simple and inexpensive method, taking into consideration the nature of the case, for preserving such interests. We find that this Act is within the police power of the states and does not unconstitutionally impair the obligation of contracts.

[10] The trial court's judgment is arguably based upon the conclusion that the statute effectuates a taking of property without just compensation contrary to the mandate of Art. I, §

21, of the Indiana Constitution. We agree with appellant that extinguishment of mineral interest under this statutory scheme does not involve an exercise by the State of its power of eminent domain. The State through this statute is not actually taking the mineral interest for its own use and benefit. Consequently, Art. I, § 21, does not provide an applicable standard for review of this statute. *Buckler* v. *Hilt,* (1936) 209 Ind. 541, 200 N.E. 219; *Foreman* v. *State ex rel. Department of National Resources, supra.* Appellees point to *Evansville & Crawfordsville R. R. Co.* v. *Dick,* (1857) 9 Ind. 433, in which this Court stated:

> "[T]he legislature have no power to authorize, in any case, either a direct or consequential injury to private property, without compensation to the owner." 9 Ind. at 436.

This statement in context gave support to the court's ruling that the power of eminent domain cannot serve as a source of immunity from suits for damages for injury to private property. The Mineral Lapse Act does not involve the injury to private property through conduct or activities of governmental agents or others having and exercising the power of eminent domain. It declares instead that a lapse of a mineral interest will occur in the event of specified conditions and circumstances. We are satisfied that substantive due process provides the proper standard for constitutional review of it.

[11] Appellant next contends that the trial court erred in concluding that the Act is violative of the guarantees of Art. I, § 23, of the Indiana Constitution and the Fourteenth Amendment of equal protection of the law by reason of the special treatment afforded certain owners of mineral interests described in Ind.Code § 32-5-11-5. That provision states:

> "Failure to file a statement of claim within the time provided in section 4 shall not cause a mineral interest to be extinguished if the owner of such mineral interest:

(1) was at the time of the expiration of the period provided in section four, the owner of ten or more mineral interests, as above defined, in the county in which such mineral interest is located, and;

(2) made diligent effort to preserve all of such interests as were not being used, and did within a period of ten years prior to the expiration of the period provided in section 4 preserve other mineral interests, in said county, by the filing of statements of claim as herein required, and;

(3) failed to preserve such interest through inadvertence, and;

(4) filed the statement of claim herein required, within sixty days after publication of notice as provided in section seven herein, if such notice is published, and if no such notice is published, within sixty days after receiving actual knowledge that such mineral interest had lapsed."

By declaring the mineral interest terminable under the conditions set forth in the other sections of the Act, the Legislature sought to create an environment in which mineral interests will be promptly exploited or abandoned. If achieved, this objective would create economic benefits for the people and industries within local communities where actual development activities result and would create other land development where abandonment results. The criteria in Ind.Code § 32-5-11-5, can be rationally conceived as establishing a border line beyond which strict application of the Act's extinguishment standards would become destructive of these goals. Minerals exist within the earth in strata and informations which do not necessarily coincide with the manner in which man as chosen to divide the surface area. Consequently it is commonly necessary to assemble several mineral interests in order to render the extraction of minerals safe and profitable. The Legislature could reasonably have concluded that those meeting the criteria set forth above include those most likely to assemble such interests and actually

produce minerals. The separate classification of interests so held within these essential clusters is rationally related to the legitimate objectives of the enactment and is consequently not contrary to the requirements of state and federal equal protection.

[12] The Act seeks to remedy a situation though to retard economic activity vital to the welfare of local communities and the general public as well. The classification erected does not involve a suspect classification or an impingement upon the exercise of a fundamental right, and consequently the traditional fair and substantial relation test is applicable to it. *Johnson et al.* v. *St. Vincent Hospital, Inc. et al., Inc.*, 404 N.E.2d 585 (1980); *Steup, et al.* v. *Indiana Housing Authority, Ind.*, 402 N.E.2d 1215 (1980). In this area of economic and social concern, legislative choices are entitled to a large degree of deference from the court. They are not required to be made with mathematical precision or along entirely logical lines. *Williamson* v. *Lee Optical of Oklahoma,* (1955) 348 U.S. 483, 487, 75 S.Ct. 461, 464, 99 L.Ed. 563; *Indiana Aeronautics Com'n* v. *Ambassadair Inc.*, (1977) 267 Ind. 137, 368 N.E.2d 1340.

> "In short, the judiciary may not sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines, see, e.g. *Day-Brite Lighting, Inc.* v. *Missouri,* 342 U.S. 42, 423, [72 S.Ct. 405, 407, 96 L.Ed. 469] (1952); in the local economic sphere, it is only the invidious discrimination, the wholly arbitrary act, which cannot stand consistently with the Fourteenth Amendment." *City of New Orleans* v. *Dukes,* (1976) 427 U.S. 297, 303-304, 96 S.Ct. 2513, 2517, 49 L.Ed.2d 511.

There has been no demonstration made which convinces us that the classification of Ind.Code § 32-5-11-5 is invidiously discriminatory or wholly arbitrary.

The judgments of the trial court here appealed from declaring the statute unconstitutional are reversed and the cases remanded to the trial court for enforcement of the Act.

GIVAN, C. J., and HUNTER, PRENTICE and PIVARNIK, JJ., concur.

APPENDIX B

(Opinion of Trial Court)

STATE OF INDIANA

SS:

COUNTY OF GIBSON

IN THE GIBSON CIRCUIT COURT

Cause No. C-77-248

Louise F. Short

vs.

Texaco, Inc.
Robert Braselton
Electra Fields
Charles Braselton
Robert E. Brazelton
Clifford M. Braselton
Osborne T. Brazelton, Jr.
David Burkhart
D.W. Mayhew, d/b/a Mayhew Oil
And Gas Developments
DeBeers Diamond Investment, LTD.

JUDGMENT ENTRY

(Filed September 18, 1978)

Comes now the plaintiff, by counsel, and come now the defendants, by counsel, and this matter having been submitted to the Court on the Stipulation of Facts and the Pre-trial Order of the Court dated July 28, 1978, and the parties having extensively briefed the legal issues involved, same now comes on for judgment by the Court, without the intervention of a jury.

And now the Court finds:

1. The Court has jurisdiction of the parties and subject matter.

2. The Attorney General of the State of Indiana has been duly notified of the claimed unconstitutionality of Indiana Code 1971, Section 32-5-11-1, *et seq,* and has appeared and filed brief herein.

3. The Stipulation of Facts, filed herein, is hereby adopted by the Court as the Court's Finding of Fact.

4. Indiana Code 1971, Section 32-5-11-1, *et seq,* being the so-called Indiana Mineral Lapse Statute, is unconstitutionally defective and is violative of the following Sections of the Indiana Constitution:

a. Article I, Section 21, providing:

> "No man's property shall be taken by law without just compensation".

b. Article I, Section 23, providing:

> "The General Assembly shall not grant to any citizens or class of citizens privileges and immunities which, upon the same terms, shall not equally belong to all citizens."

c. Article I, Section 24, providing:

> "No ex post facto law, or law impairing the obligation of contracts, shall ever be passed."

5. Indiana Code 1971, Section 32-5-11-1, *et seq,* being the so-called Indiana Mineral Lapse Statute, is unconstitutionally defective and is in violation of the following provisions of the Constitution of the United States of America:

a. As to the Fifth Amendment to the Constitution of the United States of America reading:

"No person shall be . . . deprived of life, liberty or property without due process of law; nor shall private property be taken for public use, without just compensation."

b. Section 1 of the Fourteenth Amendment to the Constitution of the United States of America providing:

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction equal protection of the law."

6. The constitutional defects of the state in question go to the very heart of the statute and therefore the entire statute is unconstitutional, void and of no effect.

7. The Court adopts, by reference, its reasoning as to unconstitutionality the memorandum opinion entered July 24, 1978 in *Pond et al* v. *Walden, et al,* being Cause Number C-78-1 in this Court.

The Court having stated its Findings of Facts now states its Conclusions of Law:

A. Indiana Code 1971, Section 32-5-11-1, *et seq,* being the so-called Indiana Mineral Lapse Statute, is unconstitutional in its entirety and is therefore void and of no effect.

B. The plaintiff, Louise F. Short, is the owner of the following described real estate, situated in Gibson County, Indiana, to-wit:

The east half of the southwest quarter of Section 29, Township 2 South, Range 11 west, containing 80 acres, more or less.

ALSO, a part of the west half of the southwest quarter of Section 29, Township 2 south, Range 11 west, and more particularly described as follows:

Beginning at the northeast corner of said half quarter section and running thence south 104 rods; thence west of the west line of said half quarter section; thence north to the northwest corner thereof; thence east to the place of beginning, and containing 52 acres, more or less,

and containing in all 132 acres, more or less.

(herein called the "Real Estate"), subject to the following:

C. An undivided one-half (½) interest in and to all of the "oil, gas and other minerals, except coal, that may be produced from" the Real Estate, "together with the right of ingress and egress at all times for the purpose of mining, drilling, exploring, operating and developing said lands for oil, gas and other minerals and storing, handling, transporting and marketing the same therefrom with the right to remove from said land all of Grantee's property and improvements." Said interest being subject to all of the terms and conditions of a "Mineral Deed" recorded April 23, 1942 in Deed Record Book 115, at page 197, in the Office of the Recorder of Gibson County, Indiana, which Mineral Deed interest is now vested in the defendant, Texaco, Inc.

D. An undivided one-sixth (1/6th) interest in and to all of the oil, gas and other minerals, except coal, that may be produced from the Real Estate, said interest being subject to all of the terms and conditions of a Mineral Deed dated July 7, 1944 and recorded in Deed Record 120, at page 17, in the Office of the Recorder of Gibson County, Indiana, which interest is now vested in the defendants, O. T. Brazelton, Jr., and Robert E. Brazelton.

E. An undivided one-thirty-second (1/32nd) interest in and to all of the oil, gas and other minerals, except coal, that may be

produced from the Real Estate, said interest being subject to all of the terms and conditions of a Mineral Deed dated July ____, 1944 and recorded in Deed Record 120, at page 46, in the Office of the Recorder of Gibson County, Indiana, which interest is now vested in the defendants, Robert E. Brazelton, Charles Brazelton, Chester Brazelton, Clifford Brazelton, O. T. Brazelton, Jr., John P. Brazelton and Rosa G. Burkhart.

F. An undivided two-sixteenth (2/16th) interest in and to all of the oil, gas and other minerals, except coal, that may be produced from the Real Estate, said interest being subject to all of the terms and conditions of a Mineral Deed dated July ____, 1944 and recorded in Deed Record 120, at page 46, in the Office of the Recorder of Gibson County, Indiana, which interest is now vested in the defendants, Robert E. Brazelton.

G. The defendant, D.W. Mayhew, d/b/a Mayhew Oil and Gas Development, is the Lessee of an oil and gas lease from the defendants, Texaco, Inc., John P. Brazelton and Jane E. Brazelton, Charles Brazelton, *et ux,* and Clifford Brazelton, *et ux,* Robert E. Brazelton, *et ux,* Clifford Brazelton and Ellen Brazelton and O.T. Brazelton, a/k/a O. T. Brazelton, Jr., which oil and gas leases are recorded as follows:

(a) In Drawer 2, Card 9155

(b) In Drawer 2, Card 9370

(c) In Drawer 2, Card 9071

(d) In Drawer 2, Card 9072

(e) In Drawer 2, Card 9073

(f) In Drawer 2, Card 9074

in the office of the recorder of Gibson County, Indiana, which oil and gas leases are valid and subsisting as relates to the Real Estate.

H. The plaintiff should pay the costs of this action.

IT IS, THEREFORE, CONSIDERED, ORDERED, ADJUDGED AND DECREED that judgment herein be entered in accordance with the aforementioned Findings of Facts and Conclusions of Law and that plaintiff take nothing by her complaint, that defendants are entitled to relief as set forth herein and that the plaintiff pay the costs of this action.

/s/ Walter Palmer, Judge, Gibson
Circuit Court

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APPENDIX C

(Judgment Appealed From)

STATE OF INDIANA

SS:

COUNTY OF GIBSON

IN THE GIBSON CIRCUIT COURT
1978 TERM

Cause No. C-78-17

Order Entry, July 25, 1978

Eden H. Pond, Edna H. Bobe, Consolidation Coal Co.

v.

Ulysses G. Walden Jr., Carolyn Sallee Walden

MEMORANDUM OPINION AND JUDGMENT ON AGREED CASE
(Filed July 24, 1978)

This case comes before this Court upon the Submission of an Agreed Case by the parties herein, pursuant to Indiana Code 1971, Sections 34-1-29-1 *et seq.*, with the necessary facts and Record, as defined in that statute. It is believed reiteration of the facts or of the Record are unnecessary except for reference.

The Trial Court wishes to express its gratitude to counsel for Plaintiffs, Defendants, Attorney General of the State of Indiana and Intervenor for their scholarly Briefs in this complicated legal issue.

The essential decision necessary in this case is to determine whether or not the so-called Indiana Mineral Lapse Statute, being I.C. 1971, 32-5-11-1 *et seq.* is constitutionally acceptable. If as contended by plaintiff it is unconstitutional, then plaintiff will prevail by judgment. If constitutional, there must necessarily be judgment for the defendants.

This Court feels that a short statement of matters of concern by way of Memorandum may be helpful to those affected by this Decision, as well as those reviewing the action of this Court.

It cannot be rationally doubted that the State of Indiana reserves the right inherent in this organized society to act in the public welfare, even to the extent of impairment of private contract. *Home Building and Loan* v. *Blaisdell,* (1934) 290 U.S. 398. As a general proposition of Constitutional Law, however, this Court believes the U.S. Supreme Court normally will abstain upon issues relating to the contract laws of the individual States. However, there are discussions in cited cases as to the principles, *Blaisdell, supra.*

It should be noted in the Agreed Facts of this case that we are not discussing an issue of murky titles, or long-lost owners of interests. There is no "cloud" on the title to this real estate, except to the extent that the Statute challenged poses such a cloud. This Statute *creates* a challenge to vested property rights, by the statutory terms of non-use or failure to register. At Common Law, there could be no termination in mineral rights as a separate estate from the fee. The question then becomes, first: can the Indiana Legislature create such a challenge, and second: has the Legislature in this Statute done so in a Constitutionally acceptable manner.

This Court does not question that the Legislature had a valid purpose in passage of this Statute, i.e., exploitation of the State's energy sources, but the method chosen is believed to be unconstitutional.

As stated, very scholarly arguments are advanced for the proposition that the Statute is Constitutional. All of these arguments fail to answer the basic inequitable result in this case, that a judgment for the surface rights owners would give them a demonstrably valuable asset in derogation of their contractual purchase, with no notice to the mineral rights owners, and no compensation to the valid owners for their loss.

Suppose the State of Indiana had been the takers of these rights from the mineral owners for distribution to some one who would exploit them, arguably for the common good. Would not Constitutionally there be a requirement of notice to the mineral owners, a right of hearing, some form of compensation, as, for example, the tax sale of real estate?

It seems clearly the law in this Country that before property rights can be taken from persons, these persons have some rights as to notice and hearing. The subject matter would govern what procedural requirements are involved, but Constitutionally it would seem the hearing would revolve around the facts essential to determination of the controversy. *Bell* v. *Burnson* (1971), 402 U.S. 535; *Mullane* v. *Central Hanover Bank and Trust Co.* (1950) 339 U.S. 306; *Goldberg* v. *Kelley* (1970), 397 U.S. 254.

Another unresolved question is, what harm would result had the statute required notice been given the mineral owners prior to the drastic severage and delivery of ownership from the mineral owner to the surface owner, at least such notice as is contemplated in *Mullane, supra?* It would perhaps induce litigation, but one queries whether that is not already the case with the statutory framework existing. The notice provision in I.C. 1971, 32-5-11-6 would seem just as precipitating a rule as would be notice prior to the legislature taking. Expediency is not always justice, whether the end sought is laudable or not.

For the reasons stated herein, this Court finds, Indiana Code, 1971 32-5-11-1, *et seq.* being Acts 1971, P.L. 423 is unconstitutional, void and of no effect.

This Memorandum of Opinion constitutes the Findings of Fact and The Conclusions of Law of This Court.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED by this Court that there be judgment for the Plaintiffs herein and against the Defendants, that Plaintiffs shall recover their costs expended, that Plaintiffs, Eden H. Pond and Edna H. Bobe, are declared to be the equal owners as tenants in common of the mineral rights in the real estate in question pursuant to the Agreed Facts, and Consolidation Coal Company is the holder of a valid and subsisting lease covering said interests.

Judgment accordingly.

/s/ WALTER H. PALMER, JUDGE
GIBSON CIRCUIT COURT

STATE OF INDIANA

SS:

COUNTY OF GIBSON

IN THE GIBSON CIRCUIT COURT
1980 Term

Cause No. C-77-248

In Re
Louise F. Short

v.

Texaco, Inc., *et al,*

ORDER
(October ____, 1980)

Comes now the plaintiff by counsel and come also the defendants by counsel, and the Court now takes judicial notice of the opinion of the Supreme Court of Indiana issued in this cause on June 23, 1980, which opinion is in the words and figures following, to-wit:

(H.I.)

and also takes judicial notice of the denial of Appellees' petition for rehearing issued in this cause on September 24, 1980.

And now the Court, having reconsidered the stipulated facts and issues in this cause in accordance with the foregoing, does now vacate the judgment heretofore entered and in lieu thereof enters the following conclusions of law and judgment:

Conclusions of Law

1. The statements of claim of mineral interest filed on June 9 and June 17, 1977, by certain of the defendants did not preserve

the interest of said defendants, or any of them, from extinction or lapse under Public Law 423, Acts of the Indiana General Assembly of 1971.

2. Plaintiff's failure to give notice to John P. Braselton and Gwendolyn Burkhart of the lapse of their interests did not preserve the interests of said defendants, or any of them, from extinction or lapse under Public Law 423, Acts of the Indiana General Assembly of 1971.

3. The issuance of the oil and gas leases described in paragraph 18 of the Stipulation of Facts did not preserve the interests of the defendants, or any of them, from extinction or lapse under Public Law 423, Acts of the Indiana General Assembly of 1971.

4. As applicable to the facts of this case, Public Law 423, Acts of the Indiana General Assembly of 1971, is constitutionally valid and enforceable under the Constitutions of both the State of Indiana and the United States of America, and, in accordance with the provisions of said Act, plaintiff is entitled to the relief prayed for in plaintiff's Complaint for Declaratory Judgment.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED by the Court that the mineral intersts described and referred to in numbered paragraphs 2, 3, 4, 5, 6, 7 and 10, of the Stipulation of Facts heretofore filed herein, be and the same are hereby declared to be permanently and absolutely lapsed and extinguished.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED by the Court that the plaintiff, LOUISE F. SHORT, has succeeded to said interests as the present owner of the interest out of which said mineral interests were carved.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED by the Court that the oil and gas leases described in

numbered paragraph 11 of the Stipulation of Facts in favor of D. W. Mayhew d/b/a Mayhew Oil and Gas Development are invalid and ineffective by reason of prior extinguishment of the Lessors' mineral interests.

IT IS FURTHER ORDERED by the Court that the defendants shall pay the costs of this action.

/s/ WALTER PALMER
Judge, Gibson Circuit Court

APPENDIX D

(Denial of Petition for Rehearing)

(Received September 26, 1980)

STATE OF INDIANA

Clerk of the Supreme Court
and Court of Appeals

Majorie H. O'Laughlin, Clerk
217 State House

No. 179S23 and 1278S303
Louise F. Short v. Texaco, Inc., et al
State of Indiana, et al v. Eden H. Pohd, et al

You are hereby notified that the Supreme Court has on this day denied Appellee's Petition for Rehearing. Givan, C.J.

Please acknowledge receipt of this notice in order that our records may show that you have been notified of this action.

WITNESS my name and the seal of said Court, this 24th day of September, 1980

/s/ Marjorie H. O'Laughlin
Clerk Supreme Court and Court of Appeals

Hall, Partenheimer & Leucking, Princeton
Mark W. Rietman, Evansville
Charles R. Nixon, Princeton
Johnson, Carroll & Griffith, Evansville
Fine, Hatfield, Sparrenberger & Fine, Evansville

APPENDIX E

(Notice of Appeal)

IN THE
SUPREME COURT OF INDIANA

No. 179 S 23

Louise F. Short,
Appellant,

v.

Texaco, Inc., Robert Braselton, Electra Fields, Charles Braselton, Chester Braselton, Robert E. Brazelton, Clifford N. Braselton, Osborne T. Braselton, Jr., David E. Burkhart, John P. Braselton, Rosa G. Burkhart, D.W. Mayhew, d/b/a Mayhew Oil and Gas Development, DeBeers Diamond Investment, Ltd.,
Appellees,

State of Indiana,
Intervenor.

Appeal from the Gibson Circuit Court
The Honorable Walter H. Palmer, Regular Judge

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

(Filed November 17, 1980)

Notice is hereby given that Texaco, Inc., Robert Braselton, Electra Fields, Charles Braselton, Chester Braselton, Robert E. Brazelton, Clifford N. Braselton, Osborne T. Braselton, Jr., David E. Burkhart, John P. Braselton, Rosa G. Burkhart, D. W. Mayhew d/b/a Mayhew Oil and Gas Development, DeBeers

Diamond Investment, Ltd., Appellees, hereby appeal to the Supreme Court of the United States from the final judgment of the Supreme Court of Indiana reversing the judgment of the trial court, entered in this action on September 24, 1980.

This appeal is taken pursuant to Title 28, United States Code, Section 1257, subparagraph two (2).

Dated this 17th day of November, 1980.

/s/ John L. Carroll (a Member of the Bar of the United States Supreme Court)

For Appellees, Texaco, Inc., Robert Braselton, Electra Fields, Charles Braselton, Chester Braselton, Robert E. Braselton, Clifford N. Braselton, Osborne T. Braselton, Jr., David E. Burkhart, John P. Braselton, Rosa G. Burkhart, D. W. Mayhew d/b/a Mayhew Oil and Gas Development, DeBeers Diamond Investment, Ltd.

JOHN L. CARROLL
Johnson, Carroll and Griffith, P. C.
2230 W. Franklin Street
P.O. Box 6016, Station B
Evansville, Indiana 47712 (#35)

Certificate of Service

JOHN L. CARROLL, being first duly sworn, upon his oath, says:

1. That he is the Attorney of record for the Appellants in the above entitled cause.

2. That on or before the 3rd day of December, 1980, he served upon the opposing counsel in the above entitled cause, the following:

Notice of Appeal to the Supreme Court of the United States

by depositing the same in the United States Mail, certified mail, return receipt requested, postage paid, at Evansville, Indiana, properly addressed to:

Verner P. Partenheimer, Jr.
Attorney at Law
219 North Hart Street
P.O. Box 313
Princeton, Indiana 47670

James M. Buthod
Attorney at Law
Suite 409, Citizens Building
115 Southeast Third Street
Evansville, Indiana 47708

Charles R. Nixon
Attorney at Law
223 West State Street
Princeton, Indiana 47670

Theodore Sendak
Attorney General
State of Indiana
State House
Indianapolis, Indiana 46204

/s/ John L. Carroll

SUBSCRIBED AND SWORN TO before me, a Notary Public in and for said County and State, this 3rd day of December, 1980.

Anne V. Finck, Notary Public
County of Residence: Vanderburgh

My Commission Expires:
August 1, 1981

JOHNSON, CARROLL & GRIFFITH, P.C.
2230 West Franklin Street
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Telephone: (812) 425-4466 (#36)

APPENDIX F

(The Indiana Dormant Mineral Interests Act) I.C. 32-5-11-1 et seq.

32-5-11-1 [46-1808]. Lapse of mineral interest—Prevention.—Any interest in coal, oil and gas, and other minerals, shall, if unused for a period of 20 years, be extinguished, unless a statement of claim is filed in accordance with section five [32-5-11-5] hereof, and the ownership shall revert to the then owner of the interest out of which it was carved. [IC 32-5-11-1, as added by Acts 1971, P.L. 423, § 1.]

32-5-11-2 [46-1809]. Mineral interest—Definition.—A mineral interest shall be taken to mean the interest which is created by an instrument transferring, either by grant, assignment, or reservation, or otherwise an interest, of any kind, in coal, oil and gas, and other minerals. [IC 32-5-11-2, as added by Acts 1971, P.L. 423, § 1.]

32-5-11-3 [46-1810]. Use of mineral interests—Definition.—A Mineral interest shall be deemed to be used when there are any minerals produced thereunder or when operations are being conducted thereon for injection, withdrawal, storage or disposal of water, gas or other fluid substances, or when rentals or royalties are being paid by the owner thereof for the purpose of delaying or enjoying the use or exercise of such rights or when any such use is being carried out on any tract with which such mineral interest may be unitized or pooled for production purposes, or when, in the case of coal or other solid minerals, there is production from a common vein or seam by the owners of such mineral interests, or when taxes are paid on such mineral interest by the owner thereof. Any use pursuant to or authorized by the instrument creating such mineral interest shall be effective to continue in force all right granted by such instrument. [IC 1971, 32-5-11-3, as added by Acts 1971, P.L. 423, § 1, p. 1970.]

32-5-11-4 [46-1811]. Statement of claim—Filing—Requirements.—The statement of claim provided in section one [32-5-11-1] above shall be filed by the owner of the mineral interest prior to the end of the twenty [20] year period set forth in section two [one] [32-5-11-1] or within two [2] years after the effective date [September 2, 1971] of this act, whichever is later, and shall contain the name and address of the owner of such interest, and description of the land, on or under which such mineral interest is located. Such statement of claim shall be filed in the office of the recorder of deeds in the county in which such land is located. Upon the filing of the statement of claim within the time provided, it shall be deemed that such mineral interest was being used on the date the statement of claim was filed. [IC 1971, 32-5-11-4, as added by Acts 1971, P. L. 423, § 1, p. 1970; 1972, P. L. 11, § 15, p. 336.]

32-5-11-5 [46-1812]. Extinguishment of mineral interest—Exceptions.—Failure to file a statement of claim within the time provided in section 4 [32-5-11-4] shall not cause a mineral interest to be extinguished if the owner of such mineral interest:

(1) was at the time of the expiration of the period provided in section four [32-5-11-4], the owner of ten [10] or more mineral interests, as above defined, in the county in which such mineral interest is located, and;

(2) made diligent effort to preserve all of such interests as were not being used, and did within a period of ten [10] years prior to the expiration of the period provided in section 4 [32-5-11-4] preserve other mineral intersets, in said county, by the filing of statements of claim as herein required, and;

(3) failed to preserve such interest through inadvertence, and;

(4) filed the statement of claim herein required, within sixty [60] days after publication of notice as provided in section seven [32-5-11-7] herein, if such notice is published, and if no such notice is publied, within sixty [60] days after receiving actual knowledge that such mineral interest had lapsed. [IC 1971, 32-5-11-5, as added by Acts 1971, P. L. 423, § 1, p. 1970.]

32-5-11-6 [46-1813]. Successor in interest—Notice requirements—Prima facie evidence.—Any person who will succeed to the ownership of any mineral interest, upon the lapse thereof, may give notice of the lapse of such mineral interest by publishing the same in a newspaper of general circulation in the county in which such mineral interest is located, and, if the address of such mineral interest owner is shown of record or can be determined upon reasonable inquiry, by mailing within ten [10] days after such publication a copy of such notice to the owner of such mineral interest. The notice shall state the name of the owner of such mineral interest, as shown of record, a description of the land, and the name of the person giving such notice. If a copy of such notice, together with an affidavit of service thereof, shall be promptly filed in the office of the recorder of deeds in the county wherein such land is located, the record thereof shall be prima facie evidence, in any legal proceedings, that such notice was given. [IC 1971, 32-5-11-6, as added by Acts 1971, P. L. 423, § 1, p. 1970.]

32-5-11-7 [46-1814]. Statement of claim—Filing—Recorder's duty.—Upon the filing of the statement of claim, provided for in section 4 [32-5-11-4] of this chapter or the proof of service of notice as provided in section seven [six] [32-5-11-6] of this chapter in the recorder's office for the county where such interest is located, the recorder shall record the same in a book to be kept for that purpose, which shall be known as the "Dormant Mineral Interest Record" and shall indicate by marginal notation on the instrument creating the original mineral interest the filing of the statement of claim or affidavit of publication and service of notice. [IC 1971, 32-5-11-7, as added by Acts 1971, P. L. 423, § 1, p. 1970.]

32-5-11-8 [46-1815]. Waiver of chapter's provisions—Time limit.—The provisions of this chapter [32-5-11-1—32-5-11-8] may not be waived at any time prior to the expiration of the twenty [20] year period provided in section 1 [32-5-11-1]. [IC 1971, 32-5-11-8, as added by Acts 1971, P. L. 423, § 1, p. 1970.]

APPENDIX G

(C. & N.W. vs. Pedersen)

80 Wis.2d 566

Chicago And North Western Transportation Company and Chicago, Milwaukee, St. Paul and Pacific Railroad Company, Respondents,

v.

Earl H. Pedersen, Register of Deeds in and for Bayfield County, Wisconsin, and Victor A. Miller, Attorney General of Wisconsin, and all other officers similarly situated in and of this state and those acting under said officers, Appellants.

No. 75-702.

Supreme Court of Wisconsin.

Argued Oct. 4, 1977.

Decided Nov. 14, 1977.

DAY, Justice.

This is an appeal from a declaratory judgment in which the trial court held secs. 700.30 and 893.075, Stats. (Ch. 260, L.1973) unconstitutional and enjoined all Wisconsin county registers of deeds from carrying out the provisions of the act. We affirm the judgment of the trial court.

Sec. 700.30, Stats., at issue here, reads as follows:

"700.30 *Mineral Rights.* (1) Any person, other than the surface fee owner, who claims title to mineral rights in land arising from an instrument other than a lease from the surface fee owner of 10 years' duration or less which by its terms is in full force and effect, shall record his claim with the register of deeds of the county in which the land is situated. The claim shall

describe the reserved rights and the land in which the rights are claimed. The register of deeds shall record the claim in a register of mineral rights and the claimant shall pay the recording fee under s. 59.57. In addition, the claimant shall thereafter pay an annual registration fee of 15 cents per acre or fraction thereof with a minimum fee of $2 for each single description registered on the lands wherein such mineral rights are claimed. Failure to register any claim of mineral rights shall result in reversion of such rights to the surface fee owner. Failure to pay the registration fee within 3 years of the annual due date shall cause all rights to revert to the surface fee owner.

"(2) Any claim of mineral rights separate from surface fee ownership arising from an instrument other than a lease from the surface fee owner of 10 years' duration or less which by its terms is in full force and effect, and recorded prior to December 31, 1974, shall be void and all rights under such claim shall revert to the surface fee owner unless such claim is recorded prior to December 31, 1977, as provided in this section. Claims of mineral rights separate from surface fee ownership arising from instruments recorded after December 31, 1974, must be recorded as provided in this section within 3 years of the date of recording the instrument creating or reserving such rights; failure to record such claims shall void such claims, which shall then revert to the surface fee owner.

"(3) Mineral rights, other than mineral rights claimed by the surface fee owner of record, may not be claimed unless based on a recorded instrument which shall be specifically referred to in the registration of such rights required by this section.

"(4) Of the annual registration fee, one-third shall go to the county in which the land is located, one-third to the municipality in which the land is located and the remaining one-third to the geological and natural history survey to be used for identification and evaluation of mineral resources of the state. The register of deeds shall collect such payments and maintain

records sufficient to identify delinquencies in payments and he shall turn the payments over to the county treasurer who shall forward the payments to those entitled to them under this subsection no later than February 28 of the year following the due date.

"(5) Municipalities and counties shall register all lands owned by them on which they claim mineral rights but shall not be required to pay a fee. Lessees of mineral rights on lands owned by counties or municipalities shall be required to pay the fee under sub. (1).

"(6) If the fee under this section is not paid on or before the due date of December 31 of each year, it will be subject to the interest rate under s. 71.13(1) accruing from the preceding December 1."

Sec. 893.075, Stats. reads as follows:

"893.075 *Adverse Possession Of Mineral Rights Defined.* Adverse possession of the land as defined in this chapter shall be deemed to include adverse possession of all mineral rights not registered under s. 700.30.

"*Section 2. Effective Date.* The first registration fee under this act shall be paid for the year 1974 and shall be paid not later than December 31, 1974. On enactment hereof, the attorney general shall promptly commence an action seeking a declaratory judgment regarding the constitutionality of this act."

Sec. 700.30, Stats. requires persons, other than surface fee owners and lessees holding leases of less than ten years, who claim title to mineral rights in land, to record their claims and pay a recording fee. Non-exempt claimants are also required to pay an annual registration fee of fifteen cents for each acre of mineral rights claimed. Failure to record claims of mineral rights or pay the annual registration fee results in reversion of the mineral rights to the surface fee owner.

The plaintiff-respondent railroad companies (hereinafter plaintiffs) claim in excess of 250,000 acres of severed mineral rights in Wisconsin, including claims in Bayfield county. The plaintiffs started a declaratory judgment action to have the statutes declared unconstitutional and to have their enforcement enjoined.

Following a hearing, the trial court issued a memorandum opinion holding the statutes were unconstitutional as violating the due process and equal protection clauses of the United States Constitution, and the uniformity of taxation clause of the Wisconsin Constitution.

Judgment was entered January 12, 1976 declaring Ch. 260 of the Laws of 1973 unconstitutional in its entirety and permanently enjoining the defendant-respondent registers of deeds (hereinafter defendants) from carrying out its provisions.

We hold that sec. 700.30, Stats., is unconstitutional because its enforcement provisions deny procedural and substantive due process.[1] The enforcement provisions in the statute are not severable from the statute as a whole so the entire statute fails.[2]

Sec. 700.30, Stats. provides that owners of severed mineral rights may lose those rights to the surface owners under a number of circumstances more fully described below.

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[1] The plaintiffs claim a denial of due process under both the state and federal constitutions. "...Art. I, Sec. 1 of the Wisconsin Constitution is . . . substantially equivalent to the due-process and equal protection clauses of the Fourteenth Amendment to the United States Constitution." *State ex rel. Sonneborn* v. *Sylvester*, 26 Wis.2d 43, 49, 132 N.W.2d 249, 252 (1965). *State ex rel. Cresci* v. *H & SS Dept.*, 62 Wis.2d 400, 414, 215 N.W.2d 361 (1974).

[2] The plaintiffs also argue that the statute denies equal protection and offends Art. VIII, Sec. I of the Wisconsin Constitution. The latter section requires that property taxes be uniform. We do not reach these issues.

[1] Mineral rights are an interest in land which may be created or transferred as any other estate in land. *Gillett and another* v. *Treganza,* 6 Wis. 343, 348 (1858); *Ganter and others* v. *Atkinson and others,* 35 Wis. 48, 51 (1874).

Where the mineral right is severed from the surface fee

> ". . . it has been held to be property, distinct from the land itself vendible, inheritable and taxable." *Elder* v. *Wood,* 208 U.S. 226, 232, 28 S.Ct. 263, 264, 52 L.Ed. 464 (1908).

[2] Before a person may be deprived of property, that person has a right to a hearing. The requirements of the hearing will vary from case to case depending on the nature of the right or property threatened, but the hearing must allow for consideration of facts essential to the decision. *Bell* v. *Burson,* 402 U.S. 535, 540-542, 91 S.Ct. 1586, 29 L.Ed. 90 (1971).

In this case, the plaintiffs' mineral rights will revert to the surface owner if they are not registered or taxes are not paid on them. At the least, the plaintiffs must have a hearing where they can question the determination of the register of deeds that the registration has not been done or that the taxes have not been paid.

[3,4] Implicit in the right to a hearing is adequate notice of the hearing. Personal service is always sufficient notice. *Mullane* v. *Central Hanover Bank & Trust Co.,* 339 U.S. 306, 313, 70 S.Ct. 652, 94 L.Ed. 865 (1950). Where a person's location is known or easily ascertainable personal service is also required. *Shroeder* v. *City of New York,* 371 U.S. 208, 212, 213, 83 S.Ct. 279, 9 L.Ed.2d 255 (1962). But for, ". . . persons missing or unknown, employment of an indirect and even a probably futile means of notification is all that the situation permits . . ." For such persons publication is adequate notice. *Mullane, supra,* at 339 U.S. 306, 317, 70 S.Ct. at 658.

In an in rem proceeding for the collection of property taxes the standards for the required notice are less stringent. In *Devitt* v. *Milwaukee,* 261 Wis. 276, 52 N.W.2d 872 (1952), the City of Milwaukee adopted an ordinance in conformity with sec. 75.521, Stats. which allowed for the enforcement of property taxes by an in rem action where tax certificates remained unpaid for over three years. The procedure set out in the act required that a petition of foreclosure be filed with the circuit court and that the petition would have the same effect as a lis pendens. A copy of the petition would be sent by registered mail to the last known addresses of owners and mortgagees and notice of the petition would appear in the city newspaper with the largest circulation once a week for three weeks. In deciding that the procedure complied with due process, this court stated that,

> "The process of taxation does not require the same kind of notice as is required in a suit at law, or even in proceedings for taking private property under the power of eminent domain." *Devitt, supra,* at 261 Wis. 276, 52 N.W.2d at 873, quoting from *Bell's Gap R. Co.* v. *Pennsylvania,* 134 U.S. 232, 239, 10 S.Ct. 533, 33 L.Ed. 892 (1890).

The payment of the fees under sec. 700.30, Stats. is a tax. The fees raise revenues beyond what is necessary to the administration of the registration scheme. Sec. 700.30(4), Stats. provides that one-third of the fees will go the state geological and natural history survey.[3] In contrast to the notice procedure approved in *Devitt, supra,* nothing in sec. 700.30, Stats. provides for any procedural due process. Therefore, the law unconstitutionally allows for the deprivation of property without due process.[4]

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[3]All the parties to this appeal agree that the registration fees are a tax.

[4]The attorney general contends that the act itself is notice. There is no authority for that argument which is a novel approach to the problem of notice. The attorney general also contends that there is nothing that needs to be decided at a hearing. As was pointed out above, a severed mineral rights owner may want to at least raise the factual issues of whether the registration was done or the tax paid.

The attorney general contends that if the statue lacks procedural due process, this court should formulate due process safeguards and read them into the terms of the statute. Procedural due process requirements have been read into other statutes.[5] Because a number of alternative methods are possible, it is more fitting for the legislature to make the choice than for this court to do so.

Substantive Due Process

The plaintiffs contend that the forfeiture provisions of the statute deny them substantive due process by an unreasonable use of the police power because their mineral rights revert to the surface owners if the rights are not registered or taxes are not paid on them.

The test for a proper exercise of the police power is whether,

> ". . . the means chosen have a reasonable . . . relationship to the purpose or object of the enactment, if it has, and the object is a proper one, the exercise of the police power is valid." *State* v. *Jackman,* 60 Wis.2d 700, 705, 211 N.W.2d 480, 484 (1973).

[5] This statute not only provides for a forfeiture of unregistered mineral rights, it also provides that the forfeited rights revert to the surface owner. This procedure violates the rule that the legislature cannot take private property from one person for the private use of another. *Chicago & N. W. R. Co.* v. *Morehouse,* 112 Wis. 1, 87 N.W. 849 (1901).

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[5]In *State ex rel. Kavach* v. *Schubert,* 64 Wis.2d 612, 219 N.W.2d 341 (1974), this court held that due process required that a defendant who had been found guilty and mentally defective at the time of the crime, be given a third phase in his trial to determine if he was still mentally defective. In *Steele* v. *Gray,* 64 Wis.2d 422, 223 N.W.2d 614 (1974), due process required a hearing prior to administrative revocation of a prison inmate's good time. In *State ex rel. Johnson* v. *Cady,* 50 Wis.2d 540, 185 N.W. 306 (1971), due process required a hearing before revocation of parole.

The attorney general admits that there is a private use here, but argues that this private use is so intimately connected with the public necessity of clearing up uncertainty over mineral right ownership that there is a quasi-public use so as to justify the legislative taking of property for that purpose. *Chicago & N. W. R. Co., supra,* and 16a C.J.S. Constitutional Law § 647a, pp. 940-941. The attorney general's argument is unpersuasive. First, it's questionable whether the purpose of clearing up mineral title uncertainty is so important that the reversion of mineral rights to the surface owner becomes a quasi-public use. Second, in *Chicago & N. W., supra,* the private parties were given compensation for the property taken for the quasi-public use. Sec. 700.30, Stats. provides for no such compensation.

[6] Sec. 700.30, Stats. provides that severed mineral rights owners or long term lessees of mineral rights must register their mineral rights and pay a yearly registration fee on the mineral rights within three years or else the rights revert to the surface fee owner. This reversion would occur without a hearing or notice of that hearing having been given to the severed rights owner, and without compensation having been paid to them. These enforcement procedures ar entirely lacking in substantive and procedural due process.

The attorney general contends that the statute is severable because the enforcement provisions may be separated from the rest of the statute.

[7] The intent of the legislature and the viability of the severed portion of the statute when standing alone are the factors to consider when deciding whether a statute should be severed. Material provisions of a statute may be eliminated,

> "... if the part upheld constitutes, independently of the invalid portion, a complete law in some reasonable aspect, unless it appears from the act itself that the legislature intended it to be effective only as an entirety and would not

have enacted the valid part alone." *Madison* v. *Nickel,* 66 Wis.2d 71, 79, 223 N.W.2d 865, 870 (1974). *City of Milwaukee County* v. *Boos,* 8 Wis.2d 215, 224, 99 N.W.2d 139 (1959).

Sec. 700.30, Stats. cannot stand without the objectionable enforcement provisions. Without the enforcement provisions, severed mineral rights owners would be required to register their rights and pay fees on them, but absolutely nothing would happen if they did not.

The attorney general suggests that the payment of fees could be enforced the same as other taxes on real or personal property, but that was not the legislature's intent. The legislature intended that the mineral rights would revert to the surface owner, which violates substantive due process as pointed out above. Without its enforcement procedures, sec.700.30, Stats. is not a viable law and would not have the same effect as the one intended by the legislature.

Judgment affirmed.

APPENDIX H

(Contos v. Herbst)

Allison CONTOS, *et al.*, Appellants,

v.

Robert L. HERBST, Individually, and as Commissioner of the Minnesota Department of Natural Resources, *et al.*, Respondents,

Andrew Korda, Individually, and as Auditor for St. Louis County, Respondent,

Minnesota Chippewa Tribe, Respondent.

No. 47346.

Supreme Court of Minnesota.

Jan. 26, 1979.

Rehearing Denied March 13, 1979.

Heard, considered, and decided by the court en banc.

KELLY, Justice.

In 1969 the legislature enacted Minn.St. 93.52, which required every owner of a fee simple interest in minerals which interest is owned separately from the fee title to the surface of the property [hereinafter referred to as severed mineral interests] to file for record a verified statement describing that interest with the register of deeds or the register of titles in the county where the interest is located. Minn.St. 93.52, subd. 2. The purpose of this requirement, as stated by the legislature, was:

> "* * * [T]o identify and clarify the obscure and divided condition of severed mineral interests in this state. Because

> the ownership condition of many severed mineral interests is becoming more obscure and further fractionalized with the passage of time, the development of mineral interests in this state is often impaired. Therefore, it is in the public interest and serves a public purpose to identify and clarify these interests." Minn.St. 9352, subd. 1.

Notice of the registration requirement was provided by publication of the legislation in legal newspapers within each county of the state and in two publications related to mining activities having nationwide circulation. Minn.St.1971, § 93.58.

In 1973 the legislature enacted additional legislation concerning severed mineral interests which is the basis for this action. L.1973, c. 650, art. XX hereafter referred to as mineral registration act. First, the legislature provided that anyone who failed to file the verified statement within the statutory period would forfeit that interest to the state. The only remedy for persons claiming an ownership interest at the time of forfeiture was the recovery of the fair market value of the mineral interest at the time of the forfeiture or at the time of trial, whichever is lesser. Minn.St. 93.55. The legislature found the additional legislation necessary "to provide adequate identification of [severed mineral interests] and to prevent the continued escape from taxation of obscure and fractionalized severed mineral interests." Minn.St. 272.039.

Secondly, the legislature subjected severed mineral interests not otherwise taxed to a tax of $.25 per acre per year or $2.00 per interest per year, whichever is greater. Minn.St. 272.04, subd. 1; 273.13, subd. 2a. In describing the basis for implementing the tax the legislature enacted the following:

> "The legislature finds, for the reasons stated below, that a class of real property has been created which, although not exempt from taxation, is not assessed for tax purposes and does not therefore, contribute anything toward the cost of supporting the governments which protect and

preserve the continued existence of the property. These reasons are as follows: (1) In the case of *Washburn* v. *Gregory,* 1914, 125 Minn. 491, 147 N.W. 706, the Minnesota Supreme Court determined that where mineral interests are owned separately from the surface interests in real estate, the mineral interest is a separate interest in land separately taxable, and do not forfeit if the overlying surface interest forfeits for nonpayment of taxes due on the surface interest; (2) Since this 1914 decision, mineral interests owned separately from the surface have been valued and assessed for tax purposes, as a practical matter, only if the value of the minerals has been determined through drilling and drill core analysis, and (3) The absence of any taxation of mineral interests owned separately from the surface, except where drilling analysis is available, has encouraged the separation of ownership of surface and mineral estates and resulted in the creation of hundreds of thousands of acres of untaxed mineral estate lands which thus are immune from tax forfeiture. The legislature also finds that the province of Ontario in Canada, which has land ownership patterns and mineral characteristics similar to that of Minnesota, has imposed a tax of $.50 an acre on minerals owned separately from the surface since 1968, and $.10 an acre before that. The legislature further finds that the identification of separately owned mineral interests by taxing authorities requires title searches which are extremely burdensome and, where no public tract index is available, prohibitively expensive. This result is caused in part by the decision in *Wichelman* v. *Messner,* 1957, 250 Minn. 88, 83 N.W.2d 800, where the so called '40 year law' was held inapplicable to mineral interests owned separately from surface interests. On the basis of the above findings, and for the purpose of requiring mineral interests owned separately from surface interests to contribute to the cost of government at a time when other interests in real property

> are heavily burdened with real property taxes, the legislature concludes that the taxation of severed mineral interests as provided in section 272.13, subdivision 2a is necessary and in the public interest, and provides fair taxation of a class of real property which has escaped taxation for many years * * *." Minn.St. 272.039.

Plaintiffs, owners of severed mineral interests situated primarily in northern Minnesota, brought this action seeking a declaration that the registration, forfeiture and tax provisions of the mineral registration act are unconstitutional and an injunction prohibiting their enforcement. The district court, sitting without a jury, entered findings of fact which agreed with the legislative findings quoted previously. In addition the district court incorporated in its findings a description of the history and magnitude of the severed interest phenomenon contained in an amicus brief prepared by attorney W. K. Montague for the case of *Kangas-Jacobsen Dairy, Inc.* v. *Lloyd-Smith,* 241 Minn. 317, 62 N.W.2d 915 (1954):

> "They [severed mineral interests] are of wide extent: the entire length of the Mesabi Range from Gunflint Lake * * down to Grand Rapids, to a width of probably twenty miles from the iron formation, is blanketed with mineral reservations, on each side of the east end of the Mesabi Range through Lake and Cook counties down to Lake Superior, a distance of fifty to sixty miles, nearly every forty has a mineral reservation. Large areas in Carlton and Crow Wing Counties are similarly covered. While we are not familiar with details of mineral reservations in other Northern Minnesota counties, we understand they are not uncommon. Every city and village on the Mesabi Range from Aurora through Eveleth, Virginia, Chisholm, Hibbing, down to Coleraine, is located on lands subject to mineral reservations. Every home, store, factory and farm in that area is subject thereto."

The district court's findings of fact concerning the taxation of severed mineral interests also incorporated a description contained in the amicus brief of attorney Montague:

> "In a substantial number of cases the reservations [severed mineral interests] were created as a result of the tax laws, and do not represent arm's length negotiations between parties. They represent deliberate attempts to arrange a transaction under which the grantor could retain for generations his speculative interest in the minerals without carrying charges, and, if merchantable ore should ever be discovered, could re-acquire the surface without cost."

The district court specifically found that 140,000 to 145,000 acres of the 721,640 acres of severed mineral interests owned by plaintiff United States Steel were created through a series of transactions between United States Steel and its subsidiaries whose purpose was to avoid ad valorem property taxes on property valuable primarily for its mineral potential. The district court further found that plaintiffs paid ad valorem property taxes on approximately 3,212 of their 1,262,664 acres of severed mineral interests.[1] Reference to additional findings of fact follows where appropriate.

Based on its findings of fact the district court concluded that the registration, taxation, and forfeiture provisions were constitutional but that the procedures attending the forfeiture provisions were unconstitutional. By virtue of the latter conclusion the district court further concluded that defendants be enjoined from claiming or asserting an ownership in plaintiffs' mineral interests by reason of the forfeiture procedures. Judgment was entered accordingly. Plaintiffs appeal from that part of the judgment upholding the registration, taxation and forfeiture

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[1] Of the 3,212 acres the majority were taxed at $1.00 per acre pursuant to the tax on unmined taconite. Minn.St. 298.26.

provisions; defendants appeal from that part of the judgment invalidating the procedures attending forfeiture and granting injunctive relief. We affirm the judgment of the district court in all respects.

The issues presented are the following: (1) Whether the classification of severed mineral interests for purposes of taxation violates the uniformity clause of the Minnesota Constitution; (2) whether the uniformity clause of the Minnesota Constitution requires that taxation of property be related in some way to its value; (3) whether the forfeiture provisions violate the due process clauses of the state and Federal constitutions; (4) whether the procedures attending the forfeiture provisions comport with the due process clauses of the state and Federal constitutions; and (5) whether the language governing the registration requirements is unconstitutionally vague.

[1-3] 1. The uniformity clause of the Minnesota Constitution reads in part:

> "Taxes shall be uniform upon the same class of subjects and shall be levied and collected for public purposes * * *" Minn.Const. art. 10, § 1.

In applying that provision we have stated that the legislature has a wide discretion in classifying property for purposes of taxation.[2] Where the classification has a reasonable basis in fact, the judgment of the legislature will not be disturbed. See *Johnson* v. *Donovan*, 290 Minn. 421, 188 N.W.2d 864 (1971); *State* v. *Min-*

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[2] The uniformity clause of our state constitution is no more restrictive upon the legislature's power to tax or classify than is the Equal Protection Clause of the Fourteenth Amendment. *Elwell* v. *County of Hennepin*, 301 Minn. 63, 221 N.W.2d 538 (1974). The United States Supreme Court has stated that where taxation is concerned and no specific Federal right, other than equal protection, is involved, the states have considerable discretion. *Lehnhausen* v. *Lake Shore Auto Parts Co.*, 410 U.S. 356, 93 S.Ct. 1001, 35 L.Ed.2d 351 (1973).

nesota Farmers' Mut. Ins. Co., 145 Minn. 231, 176 N.W. 756 (1920). Every presumption being invoked in favor of the constitutionality of an act of the legislature, plaintiffs have the burden of proof to show beyond a reasonable doubt that the act conflicts with the uniformity clause of the state constitution. See *Elwell* v. *County of Hennepin*, 301 Minn. 63, 221 N.W.2d 538 (1974).

Plaintiffs contend that they have met their burden in that the record shows that there is no difference between severed and unsevered mineral interests which can constitutionally justify the tax imposed on the former[1] without similar treatment of the latter. Specifically plaintiffs argue that, to the extent severed mineral interests have gone untaxed, so too have unsevered mineral interests escaped taxation. In addition plaintiffs argue that the practical problems attending the taxation of severed mineral interests; i.e., the difficulty in valuating and assessing severed mineral interests, apply with equal force to unsevered

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[1] The pertinent provisions of Minn.St. 273.13, subd. 2a, which subjects severed mineral interests to taxation, read in part: "Class 1b. 'Mineral interest', for the purpose of this subdivision, means an interest in any minerals, including but not limited to gas, coal, oil, or other similar interest in real estate, which is owned separately and apart from the fee title to the surface of such real property. Mineral interests which are filed for record in the offices of either the county recorder or registrar of titles pursuant to sections 93.52 to 93.58, constitute class 1b, and shall be taxed as provided in this subdivision unless specifically excluded by this subdivision. A tax of $.25 per acre or portion of an acre of mineral interest is hereby imposed and is due and payable annually. If an interest filed pursuant to sections 93.52 to 93.58 is a fractional undivided interest in an area, the tax due on the interest per acre or portion of an acre is equal to the product obtained by multiplying the fractional interest times $.25, computed to the nearest cent. However, the minimum annual tax on any mineral interest is $2. No such tax on mineral interests is due and payable on the following: (a) Mineral interests valued and taxed under other laws relating to the taxation of minerals, gas, coal, oil, or other similar interests; (b) Mineral interests which are exempt from taxation pursuant to constitutional or related statutory provisions * * *."

mineral interests. We disagree with plaintiffs' view of the record.

Upon the evidence the district court entered the following finding of fact:

> "Where taxable real property includes the rights to both surface and mineral interests (estates), the assessed valuation, and hence the property tax levied, reflects the value, if any, assigned by market forces to the totality of these rights. Plaintiffs have failed to demonstrate that such 'unsevered' mineral rights have, like severed mineral interests, escaped ad valorem property taxation."

This finding is supported by the testimony of Peter N. Handberg, the St. Louis County Assesor. He testified that in determining the "market value" of a parcel of land for tax purposes he looks to "sales of comparable properties wherever they are available," and that for rural lands (which account for the bulk of severed mineral interests) "sales are the only basis" for determining market value. These comparisons are made on the assumption that the entire "bundle of rights" that comprise the fee simple interest in the parcel, including mineral rights, are merged in one owner.

[4,5] The value determined by this method might very well be affected by the value of the mineral rights. Mr. Handberg so testified in response to a question put to him by one of plaintiffs' attorneys:

> "Q. Now, as a practical matter, in St. Louis County, with the exception of the Mesabi or Biwabik Iron formation * *, would you agree that the practice is and has been as long as you have known it, not to include the value of the minerals in arriving at an assessment where there is no objective evidence or reliable data to indicate whether or not there are minerals located therein?

> THE WITNESS [Mr. Handberg]: I don't think that's a correct statement. I think that the value we put on the property based on sales of similar property to include a mineral value. For example, if the property is sold in an area where the mining companies are interested or many properties are sold, it drives up the sales prices of the property, and so we use the sale prices as a basis of our valuation."

The fact that assessors may not value mineral interests as a separate item is not significant. As Mr. Handberg's testimony clearly shows the value of a piece of property is a composite of a number of factors, one of which includes the value of the mineral interests if unsevered. Cf. *Independent School Dist No. 99* v. *Commr. of Taxation,* 297 Minn. 378, 211 N.W.2d 886 (1973). In determining market value of property for ad valorem tax purposes, assessing authorities should consider and give due weight to every element and factor affecting market value. Therefore the district court's finding that unsevered mineral interests are valued and taxed under the normal ad valorem property tax system is adequately supported by the evidence. Since none of the parties disputes the district court's findings that severed mineral interests have escaped taxation, we cannot say that the separate classification of severed mineral interests is without a reasonable basis in fact. *Johnson* v. *Donovan, supra.*

Concerning the separate taxation of severed mineral interests the district court made two critical findings. First, the district court found that most severed mineral interests cannot be assessed for ad valorem property tax purposes for two reasons:

> "(1) The value of the mineral in the ground can only be determined by prohibitively expensive exploration such as drilling and drill core analysis; and
>
> (2) Data currently available to assessors on sales and exchanges of the property rights in mineral estates (i. e.,

> severed mineral interests) is very limited. Therefore, in most cases such available data is insufficient to permit the derivation of market values for individual severed mineral interests from the sales prices or values of comparable interests."

Second, the district court found that every mineral interest in Minnesota has some value as a property interest regardless of its location, although the value of mineral interests may vary from one part of the state to another. The first finding is not contested.

Plaintiffs vigorously contest the second finding. They rely on the expert testimony of Donald Lindgren, a geologist, who testified that the value of plaintiff's mineral interests vary widely in value, some having no economic value at the present time. The record also contains, however, testimony of other expert witnesses who detailed the abundance and distribution of minerals within the state, the history of mineral development, and the potential for future development. Even Mr. Lindgren testified to the potential for future development. On this record we cannot say that the district court's finding is clearly erroneous.

In sum the evidence supports the legislature's findings that a class of valuable property interests were escaping taxation because of the practicable difficulties in identifying, valuing, and assessing those interests within more traditional tax schemes. In light of this evidence we cannot say that the practical considerations which prompted the legislature to classify separately severed mineral interests and to impose a tax of $.25 per acre per year or $2.00 per year, whichever is greater, were unreasonable.

That practical considerations can serve as the basis for the classification and taxation of proerty was established long ago in *Mutual Benefit Ins. Co.* v. *County of Martin,* 104 Minn. 179,

116 N.W. 572 (1908).[4] There this court upheld the taxation of mortgages separately from other personalty with the following language:

> "There were good and sufficient reasons why a special method should be devised for the taxation of this kind of property. It is a notorious fact that the owners of securities in the form of bonds and notes have not been in the habit of paying their proportionate share of the taxes. This has been due in a measure to the ease with which the existence of such property can be concealed from the tax officials. But when the owner of a note takes a mortgage on real estate as security and places it upon the public records, he exposes his ownership * * * and enables the assessor to reach him. * * The owner is thus tempted to seek some devious method for escaping taxation, in order that he may be on an equality with the owner of an unsecured note or bond, which rests undiscovered in a safety deposit vault. * * * *Experience has shown that it is very difficult, if not impossible, to fairly and successfully tax this kind of property under the system ordinarily applied to personal property. This practical difficulty alone furnishes a basis for a classification, and justifies the legislature in devising a special method for the taxation of the subjects of that class.* * * * By requiring a registration tax, every mortgage security pays a moderate tax, and this, in the judgment of the legislature, is preferable to the certain uncertainties of the old system." (Emphasis added.) 104 Minn. 182, 116 N.W. 574. Cf. *Johnson* v. *Donovan, supra.*

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[4] The United States Supreme Court has also recognized practical considerations as sufficient bases for state tax classifications. See *Lehnhausen* v. *Lake Shore Auto Parts Co.*, 410 U.S. 356, 93 S.Ct. 1001, 35 L.Ed.2d 351 (1973); *Madden* v. *Kentucky*, 309 U.S. 83, 60 S.Ct. 406, 84 L.Ed. 590 (1940).

We think the reasoning in the *Mutual Benefit* case applies with equal force here. Here the taxation of severed mineral interests in the same manner as other realty proved to be impracticable and also, because of this impracticability, had encouraged the separate ownership of surface and mineral estates. A class of property having some value was not paying its proportionate share of taxes. The remedy chosen by the legislature was to tax mineral interests on a uniform basis, which is but one part of the general system of mineral taxation. The tax is imposed only on those mineral interests not "valued and taxed under other laws relating to the taxation of minerals, gas, coal, oil or other similar interests." Minn.St. 273.13, subd. 2a. For example: the state tells us that where the value of the minerals themselves is determined, a tax is levied on the basis of such value. Unmined iron ore, except certain low recovery ore, is designated as Class 1a real property, presently assessed at 50 percent of its market value, and taxed at the prevailing mill rate. Minn.St. 273.13, subd. 2. Low recovery iron ores also fall within class 1a but are valued at from 30 percent to 48½ percent of market value. Minn.St. 273.15. Unmined taconites and iron sulphides are to be assessed and taxed on the basis of value with the one important difference that the tax may not exceed $10.00 per acre. Minn.St. 298.26. Finally, all other severed mineral interests, to the extent they can be valued, are susceptible to ad valorem taxation pursuant to Minn.St. 272.04 in the same manner as other interests in land. In effect the legislature has directed that severed mineral interests be taxed in relation to value or production where possible but that under no circumstances can such an interest be taxed at less than $2.00 per interest. We cannot say that the legislature has exceeded its discretion.

The cases upon which plaintiffs rely do not compel a contrary conclusion. In *State ex rel. Owen* v. *Donald,* 161 Wis. 188, 153 N.W. 238 (1915), the plurality opinion declared unconstitutional a statute which imposed a tax on severed mineral in-

terests. The concurring opinion of Justice Timlin, however, indicates that the reason the statute was invalid was because its tax forfeiture provisions treated owners of severed mineral interests differently from owners of other property interests. Likewise, in *Northwestern Improv. Co.* v. *Morton County,* 78 N.D. 29, 47 N.W.2d 543 (1951), the statute taxing severed mineral interests was unconstitutional because it imposed a tax on severed mineral interests created by reservations in deeds but did not tax severed mineral interests created by a direct conveyance of the mineral interest. The court cited an earlier decision upon which plaintiffs heavily rely, *Northwestern Improv. Co.* v. *State,* 57 N.D. 1, 220 N.W. 436 (1928), only for the proposition that a classification cannot be based solely on the manner mineral rights are severed from the surface interest. The North Dakota Supreme Court did not give the decision the broad interpretation the plaintiffs urge this court to adopt.

[6]. 2. Plaintiffs also argue that the Minnesota Constitution requires that real property taxes be related to value. Plaintiffs have cited no authority, however, and we have discovered none, that directly supports their argument. To the contrary the language of the constitution and its interpretation by this court suggest that the controlling constitutional provision was specifically amended to eliminate the absolute requirement that taxes be related to value.

The Minnesota Constitution currently provides only that "[t]axes shall be uniform upon the same class of subjects * * * ." Minn.Const. art. 10, § 1. Prior to 1906, however, the Minnesota Constitution required "taxes to be as nearly equal as may be, and all property on which taxes are to be levied shall have a cash valuation, and be equalized and uniform throughout the state." Minn.Const. art. 9, § 1 (1857), amended 1869, 1881, 1894, 1906. Interpreting the prior constitutional language, this court declared unconstitutional a probate fee arbitrarily based upon a cash valuation, *State* v. *Gorman,* 40 Minn. 232, 41 N.W. 948 (1889); and a tax of one cent per ton on

iron ore mined within the state. *State* v. *Lakeside Land Co.*, 71 Minn. 283, 73 N.W. 970 (1898). In response to a number of unfavorable tax decisions the people of the state amended the constitution in 1906 to its present broad provision. Anderson, *The Need for Constitutional Revision in Minnesota,* 11 Minn.L.Rev. 189, 204. The purpose of the 1906 amendment was to free the legislature from most of the previous constitutional restraints.

> "The fair adjustment of tax burdens * * * demanded more comprehensive powers in the legislature; and the people, relying upon the responsibility of that body to its constituents, relaxed the restraints theretofore existing." *Reed* v. *Bjornson,* 191 Minn. 254, 259, 253 N.W. 102, 104 (1934).

The "wide-open tax amendment," as it was popularly called, eliminated the "absolute requirement of taxation of all property on the basis of a cash valuation." W. Anderson, A History of the Constitution of Minnesota 190 (1921).

The cases upon which plaintiffs rely do not directly support their position. In *Independent School Dist. No. 99* v. *Commr. of Taxation,* 297 Minn. 378, 211 N.W.2d 886 (1973), this court reversed a decision of the Tax Court because the record did not indicate whether the assessing authorities considered every element affecting market value as required by the statutory scheme. The decision did not, however, contain any language indicating market value was a constitutional requirement. Similarly, plaintiffs' reference to Minn.St. 273.11 as legislative recognition that property must be taxed according to value can be equally rationalized as a legislative recognition of equality. See *In re Petition of Dulton Realty, Inc.* v. *State,* 270 Minn. 1, 15, 132 N.W.2d 394, 405 (1964).

[7,8] Nor are cases involving the validity of assessments for real estate taxes persuasive. See *In re Petition of Dulton Realty,*

Inc. v. *State, supra; In re Petition of Hamm* v. *State,* 225 Minn. 64, 95 N.W.2d 649 (1959). Both cases simply require that taxes on any one piece of property be uniform in relation to the taxes levied on other property of the same class. It is true that this court said, in reference to the uniformity clause, that it does not "permit the adoption of an arbitrary yardstick of valuation for all properties which ignores their differences in actual market value." 255 Minn. 70, 95 N.W.2d 654. Here however, none of the parties contest the fact that severed mineral interests cannot readily be valued. Taken together with the district court's finding that every mineral interest has some value as a property interest regardless of its location, the uniform tax imposed on severed mineral interests represents a reasonable exercise of the legislature's authority to tax a class of real property that has escaped taxation. The uniformity clause does not require absolute equality:

> "* * * The distribution of the tax burden in such manner as seems equitable is recognized as a proper exercise of the power of taxation. The selection of subjects of taxation * * * is inherent in that power. The process of selection involves classification with resulting diversity in the subjects selected for taxation * * * as well as in the amount of the tax." *C. Thomas Stores Sales System, Inc.* v. *Spaeth,* 209 Minn. 504, 297 N.W. 9, 16 (1941).

As noted earlier the separate classification of severed mineral interests is reasonable. Therefore the fact that the amount of tax may vary in some instances depending on the number of owners does not make the tax constitutionally infirm.[5]

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[5]Plaintiffs made a further argument that a tax which exceeds the value of the property tax is unconstitutional. The test whether a tax statute violates the due process clause of the Fourteenth Amendment is whether the tax is within the lawful power of the legislature. The due process clause is applicable only if the tax is so arbitrary as to compel

Plaintiffs also have referred to cases from other jurisdictions which support their position. See, e.g., *State of Texas* v. *Federal Land Bank of Houston,* 160 Tex. 282, 329 S.W.2d 847 (1959); *Chicago and Northwestern Transportation Co.* v. *Pederson,* Bayfield County Circuit Court, December 18, 1975, affirmed, 80 Wis.2d 566, 259 N.W.2d 316 (1977). Those decisions are not persuasive, however, since those jurisdictions contain constitutional provisions dissimilar from that in our constitution. For example, the Texas Constitution expressly requires that all property be taxed in proportion to its value. Tex.Const. art. 8, § 1. Similarly, the Wisconsin Supreme Court, interpreting that state's uniformity clause, has stated that all property taxed must bear its burden equally on an ad valorem basis. See *Gottlieb* v. *Milwaukee,* 33 Wis.2d 408, 424, 147 N.W.2d 633, 641 (1967).

3. The statutory scheme at issue requires the owners of severed mineral interest to file a verified statement containing, *inter alia,* the legal description of the property upon or beneath which the severed mineral interest exists, and information indicating where the instrument from which the severed mineral interest was created or acquired, may be found. Minn.St. 93.52, subd. 2. If the owner of a severed mineral interest fails to file the verified statement within the alloted time period, the mineral in-

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the conclusion that the statute does not involve the exercise of the taxing power but a direct exercise of a different and forbidden power. *A. Magnano Co.* v. *Hamilton,* 292 U.S. 40, 54 S.Ct. 599, 78 L.Ed. 1109 (1934). Any attempt to determine the constitutionality of a tax by its amount furnishes "no judicial ground for striking down a taxing act." 292 U.S. 47, 54 S.Ct. 602, 78 L.Ed. 1116.

On this record we cannot say that the tax imposed on severed mineral interests is so arbitrary as to violate due process. The record clearly establishes that severed mineral interests were not paying any taxes, that some severed mineral interests were created to avoid ad valorem taxation, and that severed mineral interests have some value. The legislature's response, which assures that all severed mineral interests will pay at least some tax, is not unreasonable as an exercise of its power to tax.

terest forfeits to the state. Minn.St. 93.55. Plaintiffs argue that the registration and forfeiture provisions violate the due process clauses of the state and Federal constitutions.

[9,10] Where an economic regulation is involved, due process requires that legislative enactments not be arbitrary or capricious; or, stated differently, that they be a reasonable means to a permissive objective. *Lee* v. *Delmont,* 228 Minn. 101, 36 N.W.2d 530 (1949); *McElhone* v. *Geror,* 207 Minn. 580, 292 N.W. 414 (1940); *Nebbia* v. *New York,* 291 U.S. 502, 54 S.Ct. 505, 78 L.Ed. 940 (1934). Due process demands only that (1) the act serve to promote a public purpose, (2) it not be an unreasonable, arbitrary or capricious interference, and (3) the means chosen bear a rational relation to the public purpose sought to be served. *Federal Distillers, Inc.* v. *State,* 304 Minn. 28, 229 N.W.2d 144, appeal dismissed, *sub nom., Heaven Hill Distilleries, Inc.* v. *Novak,* 423 U.S. 908, 96 S.Ct. 210, 46 L.Ed.2d 137 (1975).

Plaintiffs do not seriously quarrel with the purpose of the act, which is to identify and clarify the obscure and divided ownership conditions of severed mineral interests in order to facilitate their development. Minn.St. 93.52, subd. 1. Plaintiffs do argue, however, that the registration requirement is unreasonable in that the record indicates that owners of severed mineral interests are not difficult to locate. But the record also contains evidence indicating that a large number of mineral interests were severed in the late nineteenth century and early twentieth century, that a large number of the severed mineral interests are fractionalized, and that the determination of ownership of the fractionalized mineral interests is time consuming and often hinders exploration and development of minerals. On this record we cannot say that registration requirement is unreasonable.

[11] Plaintiffs also argue that the forfeiture provisions bear no reasonable or legitimate relationship to any end sought by the registration requirements. The basis for their argument is

that under the prior statutory scheme, owners of severed mineral interests were given until January 1, 1975, to file the verified statements of ownership. The penalty imposed for the failure to file was to permit the Commissioner of Natural Resources to lease the mineral interest as agent for the owner. Minn.St. 1971, § 93.52, subd. 2; § 93.55. Prior to the filing deadline, however, the legislature enacted the forfeiture provisions as the penalty for failure to comply with the registration requirement. Thus plaintiffs argue that the legislature was in no position to know whether the forfeiture provisions were necessary or not. While the record indicates that some statements were not filed before the forfeiture provisions were in effect because the deadline had not expired, the record also indicates that, for whatever reason, the filings were not being made. Therefore the legislature could conclude that the penalty of forfeiture was necessary to ensure that the necessary filings would be made. The legislature also could have concluded that the former penalty provisions, i.e., allowing the state to lease the mineral interest, were inadequate in light of the tax imposed on severed mineral interests. Owners of severed mineral interests might well be reluctant to make the necessary filings and thereby subject their interest to taxation. Given the public purpose of the act, the means chosen by the legislature do not violate due process.

[12] 4. The statutory scheme at issue required that notice of the registration requirement and the attendant forfeiture provisions be given by publication of the scheme in a legal newspaper within each county in the months of October, November and December, 1973, and in two publications related to mining activities which have a nationwide circulation. Minn.St. 93.58. The scheme also provided that if the owner of a severed mineral interest fails to make the required filings within the allotted time period, the mineral interest forfeits to the state. Minn.St. 93.55. Thereafter anyone claiming an ownership interest in a severed mineral interest before forfeiture may commence an action to determine ownership and the fair market value both at the time

of forfeiture and the time of bringing the action. The successful claimant recovers lesser of the two values. *Id.* Plaintiffs argue that the statutory scheme violates the due process clauses of the state[6] and Federal constitutions[7] because the notice provisions are inadequate and because an owner of a severed mineral interest who fails to comply with the registration requirement is denied an opportunity for a hearing before the forfeiture occurs. We agree.

[13] At a minimum the due process clause requires that deprivation of property be preceded by notice and an opportunity for a hearing appropriate to the case. *Mullane* v. *Central Hanover, etc., Tr. Co.*, 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950). The *Mullane* court discussed the sufficiency of notice as follows:

> "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. (Citations omitted.) The notice must be of such nature as reasonably to convey the required information * * * But if with due regard for the practicalities and peculiarities of the case these conditions are reasonably met, the constitutional requirements are satisfied." 339 U.S. 314, 70 S.Ct. 657, 94 L.Ed. 873.

The question is whether the state's efforts of notification can be said to be reasonably calculated to apprise the owners of severed mineral interests of the pendency of the forfeiture. Cf. *Robinson* v. *Hanrahan*, 409 U.S. 38, 93 S.Ct. 30, 34 L.Ed.2d 47 (1972).

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[6]Minn.Const. art. 1, § 7.

[7]U.S.Const. Amend. XIV.

The state argues that notice by publication is constitutionally adequate here because of the practicalities and peculiarities associated with identifying and locating owners of severed mineral interests. See Minn.St. 93.52, subd. 1. It is true that the St. Louis County Assessor testified that information concerning the identification and ownership of severed mineral interests is not contained in public records and, where contained in private abstract records, is prohibitively expensive to obtain. But the record also contains testimony indicating that owners of severed mineral interests could be identified and located. The statute as written, however, does not distinguish between those owners who could be identified with little or no diligence and those whose identity, even with due diligence, could not be ascertained. Under these circumstances, we think notice by publication of the statutes alone is inadequate.

[14] The United States Supreme Court has recognized that publication alone is not a reliable means of acquainting interested parties of the fact that their interests are subject to forfeiture:

> "* * * Chance alone brings to the attention of even a local resident an advertisement in small type inserted in the back pages of a newspaper * * *" *Mullane,* 339 U.S. 315, 70 S.Ct. 658, 94 L.Ed. 874.

We likewise have recognized the unreliability of notice by publication. *Meadowbrook Manor, Inc.* v. *City of St. Louis Park,* 258 Minn. 266, 104 N.W.2d 540 (1960). In the instant case the chance of notice is further reduced in that the notice required to be published does not name those whose attention it is supposed to attract. Furthermore the state is not required to do anything, e.g., attachment, entry upon real estate, which might reasonably be expected to call to the owner's attention that his mineral interest is subject to forfeiture. Under these circumstances, notice by publication is inadequate where forfeiture is the penalty imposed for mere failure to act. Cf.

Lambert v. *California,* 355 U.S. 225, 78 S.Ct. 240, 2 L.Ed.2d 228 (1957).

[15] We are also in agreement with plaintiffs' argument that the statutory scheme attending the forfeiture provisions violates due process because it contains no provision for a hearing to determine the validity of the forfeiture. Due process requires, except in emergency situations, a hearing that is meaningful and appropriate to the nature of the case before a party can be deprived of a property interest. *Mullane, supra.* The statute in question contains, in part, the following language:

> "If the owner of a mineral interest fails to file the verified statement * * the mineral interest shall forfeit to the state. * * * After the mineral interest has forfeited to the state pursuant to this section, a person claiming an ownership interest before the forfeiture may recover the fair market value of the interest, only in the following manner. An action must be commenced within six years after the forfeiture under this section to determine the ownership. * *." Minn.St. 93.55.

The language of the statute clearly provides that, upon the failure to file the verified statement, the mineral interest forfeits to the state; the only judicial determination to be made is whether the party thereafter claiming an ownership interest was the owner at the time of forfeiture. The only remedy available to an owner whose interest has forfeited is the following:

> "* * * Persons determined by the court to be owners of the interests at the time of forfeiture to the state under this section may present to the commissioner of finance a verified claim for refund of the fair market value of the interest. * * Thereupon the commissioner of finance shall refund to the claimant the fair market value at the time of forfeiture or at the time of bringing the action, whichever is lesser, less any taxes, penalties, costs, and interest which

> could have been collected during the period following the forfeiture under this section, had the interest in minerals been valued and assessed for tax purposes at the time of forfeiture under this section * * * Minn.St. 93.55.

We cannot imagine a more clear violation of due process than the failure to provide a hearing before forfeiture. *Mullane, supra.*

[16] Defendants argue that the constitutionally-required hearing is merely postponed and that the remedy provided is adequate under the circumstances. Defendants rely on *Fuentes* v. *Shevin,* 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed.2d 556 (1972), wherein the court stated that, in limited circumstances, immediate seizure of a property interest, without an opportunity for a prior hearing, is constitutionally permissible. In determing whether an immediate seizure of a property interest may be constitutionally permissible, the court looks at the following: (1) whether the seizure is necessary to secure an important governmental or general public interest, (2) whether there exists a special need for very prompt action, and (3) whether the state has kept strict control over its monopoly of force.

We do not think the *Fuentes* exception is applicable. First, in those cases cited by the Supreme Court as employing the exception, a party whose property interest was subjected to immediate seizure had an opportunity to contest the seizure itself. See, *Calero-Toledo* v. *Pearson Yacht Leasing Co.,* 416 U.S. 663, 94 S.Ct. 2080, 40 L.Ed.2d 452 (1974); *Robinson* v. *Hanrahan,* 409 U.S. 38, 93 S.Ct. 30, 34 L.Ed.2d 47 (1972); *Phillips* v. *Commissioner of Internal Revenue,* 283 U.S. 589, 51 S.Ct. 608, 75 L.Ed. 1289 (1931). No such opportunity is available here.

Second, assuming arguendo that the *Fuentes* exception is applicable, defendants have not indicated why the prompt forfeiture provisions are necessary. See, e. g., *North American, etc., Storage* v. *Chicago,* 211 U.S. 306, 29 S.Ct. 101, 53 L.Ed.

195 (1908) (postponement of notice and hearing constitutionally permissible to protect public from contaminated food). While forfeiture may be a necessary incentive to ensure filing, there does not appear to be any special need to dispense with the constitutionally required hearing before the forfeiture. Defendant's argument based on *Fuentes* is not persuasive.

Defendants also argue that the registration and forfeiture provisions contained in the mineral registration are sufficiently analogous in effect to the marketable title act, Minn.St. 541.023, which was upheld in *Wichelman* v. *Messner,* 250 Minn. 88, 83 N.W.2d 800 (1957), as to allow the constitutionality of the former to be sustained on the strength of the latter. Briefly stated, the court's holding in *Wichelman* sustained the constitutionality of the marketable title act, which required those owning interests in "old conditions and restrictions," e. g., right of re-entry, possibility of reverter, to record notice of the continued existence of such rights or permit their extinguishment by the barring of future actions affecting possession based on any such conditions or restrictions.

Specifically defendants argue that the enactment of the legislation, the publication of the act's provisions in a legal newspaper in each county throughout the state, and the time period allowed within which to make the required filing, are sufficient to comport with due process. Defendants point out that a period of 9 months within which to file the required notice was approved vis-a-vis the marketable title act; the mineral registration act allowed at least 19 months. In *Wichelman,* however, the court discussed the amount of time given to make the required filings, not with respect to the sufficiency of notice, but with respect to the constitutional prohibition against retrospective legislation. The court specifically stated that lack of notice was not a valid consideration. 250 Minn. 110, 83 N.W.2d 818. In any event we do not find defendants' analogy between the mineral registration act and the marketable title act to be persuasive.

The marketable title act was intended, as its name indicates, to "relieve a title from the servitude of provisions contained in ancient records which 'fetter the marketability of real estate.'" *Wichelman, supra,* 250 Minn. 100, 83 N.W.2d 812. The legislature may have concluded that the servitudes arising from ancient records had outlived the reasons for their creation, that they may have been created for the benefit of persons who are disinterested in the observance of the conditions and restrictions, and that the interest impede the full economic use of property. Further, the marketable title act provided that the person against whom the act is invoked is conclusively presumed to have abandoned his interest in the property. Minn.St. 541.023, subd. 5. Thus the marketable title act was not intended to extinguish valid but inconvenient claims. The mineral registration act, on the other hand, extinguishes valid as well as invalid claims upon the mere failure to file. It is unlikely that the holders of mineral rights have any intention of abandoning their rights; thus, any conclusive presumption of abandonment would be devious and would amount to intellectual dishonesty. Under these circumstances publication is not adequate.

Again analogizing to the marketable title act and its interpretation in *Wichelman, supra,* defendants argue that the mineral registration act can be sustained as a statute of limitations in that the failure to file under either scheme divests an owner of a property interest. We disagree.

The purpose of a statute of limitations is to "prescribe a period within which a right may be enforced, afterwards withholding a remedy for reasons of private justice and public policy." *Bacherta* v. *Hayes-Lucas Lumber Co.,* 201 Minn. 171, 176, 275 N.W. 694, 697 (1937). Statutes of limitations generally affect the remedy and not the right. *Baker* v. *Kelley,* 11 Minn. 480 (1866). The United States Supreme Court has recognized that the distinction between substantive rights and remedial or procedural rights vis-a-vis statutes of limitation may not be clear cut. Nevertheless the court has adopted as a matter of constitu-

tional law the hypothesis that statutes of limitation go to matters of remedy, not to destruction of rights. *Chase Securities Corp.* v. *Donaldson,* 325 U.S. 304, 65 S.Ct. 1137, 89 L.Ed. 1628 (1945). The mineral registration act, however, directly affects a property interest without any pretense of affecting a remedy only. The effect of defendants' argument is to destroy the distinction between substantive rights and procedural rights. While we recognize that the distinction may in some cases be difficult to discern, this case is not one of them.

Finally, defendants argue that the constitutionality of the mineral registration act can be sustained on the authority of the marketable title act in that both have the sanctions of a recording act.[8] In support of their position defendants make the following points. First, the penalty for failure to comply with the marketable title act, as with the mineral registration act, is the possibility of complete divestiture of ownership of a property interest. Second, under both the marketable title act and the mineral registration act, forfeiture may be prevented by filing the required information. Finally, as noted in *Wichelman, supra,* the marketable title act and the mineral registration act both have as their justification improving the marketability of real estate. Therefore defendants conclude the mineral registration act is a valid exercise of the police power.

While the analogy to the sanctions of a recording act may have been proper in the context of the marketable title act which was directed principally at interests in property which have outlived the reasons for their creation, that analogy is not proper here. It is true that both the marketable title act and the mineral registration act attempt to remedy defects in the recording system through the imposition of similar penalty provisions. To

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[8] There is no question that recording acts are constitutional as a valid exercise of the police power. *Jackson* v. *Lamphire,* 28 U.S. (3 Pet.) 280, 7 L.Ed. 679 (1830). See *American Land Co.* v. *Zeiss,* 219 U.S. 47, 31 S.Ct. 200, 55 L.Ed. 82 (1911).

that extent defendant's analogy is appropriate but only to that extent. As noted previously, the mineral registration act is not directed at interests created in ancient records which have outlived their usefulness but at all severed mineral interests whenever created. Further the marketable title act was limited to stale claims which could be presumed to be abandoned and of no value. The mineral registration act however, is not so limited. As the district court found, every mineral interest has some value as a property interest; some of plaintiffs' interest has some value as a property interest; some of plaintiffs' interests appear to be enormously valuable. Finally, the mineral registration act and traditional recording acts are easily distinguished by their operation and effect. The failure to file under a recording act does not automatically result in divestiture. Recording acts typically divest the rights of a grantee in an unrecorded conveyance only if his grantor conveys the same interest to a subsequent purchaser who purchases in good faith and for value. See Minn.St. 507.34. Since the consequences of failing to file are so different, what satisfies due process in terms of a recording act is not sufficient for the mineral registration act.

5. Plaintiffs argue that certain language used in Minn.St. 93.52, subd. 2, is so vague and ambiguous as to violate due process. The statute, with emphasis on the challenged language, reads in part as follows:

> "* * * [E]very owner of a fee simple interest in *minerals*, hereafter referred to as a mineral interest, in lands in this state, which interest is owned separately from the fee title to the surface of the property upon or beneath which the mineral interest exists, shall file for record * * * in the county where the mineral interest is located a verified statement citing section 93.52 to 93.58 and setting forth his address, his *interest in the minerals* and both (1) the legal description of the property upon or beneath which the interest exists, and (2) the book and page number or the document number * * *." (Emphasis added.) Minn.St. 93.52, subd. 2.

[17] In considering plaintiffs' claim we begin with the presumption of constitutionality. A statute will not be declared void for vagueness unless it is so uncertain and indefinite that after exhausting all rules of construction it is impossible to ascertain legislative intent. *Wichelman, supra.* We further explicated the general rule in *Wichelman* with the following:

> "* * * A statute will not be declared void for vagueness and uncertainty where the meaning thereof may be implied, or where it employs words in common use, or words commonly understood, or words previously judicially defined, or having a settled meaning in law, or a technical or other special meaning well enough known * * *, or an unmistakable significance in the connection in which they are employed. In short, legislation otherwise valid will not be judicially declared null and void on the ground that the same is unintelligible and meaningless unless it is so imperfect and so deficient in its details as to render it impossible of execution and enforcement, and is susceptible of no reasonable construction that will support and give it effect, and the court finds itself unable to define the purpose and intent of the legislature." 250 Minn. 111, 83 N.W.2d 819.

[18] Applying the legislative policy expressly stated in the mineral registration act, which is to identify and clarify the obscure ownership conditions of severed mineral interests in this state, we conclude that the alleged ambiguities raised by plaintiffs, being subject to reasonable constructions consistent with the legislature's intent, are not unconstitutionally vague. A short discussion of certain ambiguities raised by plaintiffs illustrates our conclusion.

[19] For example, plaintiffs, relying on *Vang* v. *Mount,* 300 Minn. 393, 220 N.W.2d 498 (1974), argue that the word "mineral" is ambiguous because what is included in a general mineral reservation depends on the intent of the parties and the circumstances surrounding the reservation. It is clear from the

language of the statute and from the express legislative intent that the legislature intended owners of all severed mineral interests to register, regardless of what the parties intended to convey. For that reason plaintiffs' reliance on *Vang* v. *Mount* is misplaced.

[20] Plaintiffs also contend that the phrase "owned separately from the surface" is ambiguous in that a mineral interest once severed but now owned by the same person who owns the surface might be considered still severed for purposes of Minn.St. 93.52, subd. 2. We do not agree. The plain purpose of the mineral registration act is to locate, identify, and tax mineral interests owned by someone other than the owner of the surface interest. Minn.St. 93.52, subd. 1; 272.039. Where the surface and mineral interest are jointly owned, it is obvious that the mineral registration requirements do not apply.

[21] A final example is plaintiffs' argument that the meaning of the requirement that the owner must refer to the "instrument by which the mineral interest is *created or acquired*" is ambiguous, one interpretation being that two such instruments might exist—one which created the instrument and one by which the present owner acquired the interest. The purpose of the statute being to identify current owners, the statute requires the statement in such a case to refer to the instrument by which the mineral interest was acquired. The legislature obviously included the disjunctive "or" in recognition of the fact that there may be cases where no deed or other instrument named the current claimant as owner. In those cases reference to the instrument creating the mineral interest is appropriate. We need not burden this opinion with examples of other ambiguities raised by plaintiffs. It is sufficient to say that the mineral registration act is not unconstitutionally vague.

Affirmed.

SHERAN, C. J., and OTIS and ROGOSHESKE, JJ., took no part in the consideration or decision of this case.

APPENDIX I

THE SUPREME COURT OF ILLINOIS

Docket No. 52136

ROBERT JOE WILSON, Appellant, v. MARCEIL GREENHALGH BISHOP *et al.*, Appellees.

(Decided October 17, 1980)

MR. JUSTICE UNDERWOOD delivered the opinion of the court:

This litigation arose in 1976 when it was discovered that commercial quantities of oil underlay a portion of a 72-acre tract of land in White County in which the surface area is owned by plaintiff, Robert Joe Wilson. The dispute concerns ownership of an undivided one-third interest in the oil and gas, which plaintiff claims pursuant to the operation of the dormant mineral interests act (the Act) (Ill. Rev. Stat. 1975, ch. 30, pars. 197, 198). The circuit court of White County, however, held that those sections "violate the due process and contract clauses of the Constitutions of the State of Illinois and the United States." The appeal comes directly to us pursuant to our Rule 302(a). 73 Ill. 2d R. 302(a).

Plaintiff alleged that defendant Marceil Greenhalgh Bishop, and defendants Donald B. Driscoll and Ann Driscoll, individually and as trustees under the will of Beatrice M. Driscoll, abandoned their ownership of the disputed interest by failing to file written notices in the recorder's office of White County or by otherwise preserving their ownership as provided in the following sections of the Act:

> "Sec. 1. Any interst in oil, gas, or associated hydrocarbons, liquid or gaseous, in any land owned by anyone

other than the owner of the surface, which has not been devised, sold, leased, mortgaged or transferred by instrument recorded in the office of the recorder of deeds in the county where such interest is located for a period of 25 years shall, in the absence of the actual production of oil, gas or associated hydrocarbons, liquid or gaseous, from such land, or from lands covered by a lease to which such interest is subject, or from lands pooled, unitized or included in unit operations therewith, during such period of 25 years, be deemed abandoned, unless the owner thereof, within 3 years after the effective date of this Act or within 25 years after the last devise, sale, lease, mortgage or transfer of record of such interest or actual production of oil, gas or associated hydrocarbons, liquid or gaseous, from such land, or from lands covered by a lease to which such interest is subject, or from lands pooled, unitized, or included in unit operations therewith, whichever is later, records a claim of interest as provided in this Act. Any interest in oil, gas or associated hydrocarbons, liquid or gaseous, deemed abandoned as herein provided shall vest as of the date of such abandonment in the owner of the surface."

"Sec. 2. Any interest in oil, gas or associated hydrocarbons, liquid or gaseous, referred to in this Act may be preserved by the recording within the period specified in this Act a written notice in the recorder's office for the county where such interest is located, which notice shall be verified by oath, describe the land and the nature of the interst claimed, give the name and address of the person or persons claiming the interest, and state that such person or persons desire to preserve the interest and do not intend to abandon same. This recording of notice preserves such interest from abandonment for a period of 25 years thereafter when, if the nondormant character of the interest has not been evidenced by sale, lease, mortgage or transfer by instrument recorded in the recorder's office for

> the county where such interest is located, oil, gas or associated hydrocarbons, liquid or gaseous, actually produced from those land, or from lands covered by a lease to which such interest is subject, or from lands pooled, unitized or included in unit operations therewith, or a like notice filed, such interest shall be deemed abandoned. In the absence of prior abandonment, such interest may be preserved indefinitely by the filing of notices or by other actions evidencing nondormancy of the interest in accord with this Act at intervals of not more than 25 years." (Ill. Rev. Stat. 1975, ch. 30, pars. 197, 198.)

Plaintiff maintains that the statute automatically vested the disputed interest in him upon failure of defendants to comply with the statutory requirements, and that the oil and gas leases entered into between defendants and J. D. Turner in 1975 are null and void. Following a bench trial the court entered a decree which included findings that the interests of defendants Bishop and Driscoll constituted a severed freehold estate entitled to the usual rights and incidents of vested ownership, and that the quoted sections of the Act deprive defendants of their property without due process of law and impair the obligations of contract. The court accordingly declared that the oil and gas leases between defendants and Turner are valid, and ordered the impounded oil proceeds paid to defendants in proportion to their ownership interests.

In this appeal, plaintiff argues that the trial court erred in treating the rights of a severed mineral interest owner as vested property rights, in refusing to consider the Act's effect as a statute of limitations, and in finding that plaintiff did not acquire the mineral interests of defendants. It is well established "that the constitutional guarantees of procedural due process only become operative where there is an actual or threatened impairment or deprivation of 'life, liberty or property.' (U.S. Const., amend. XIV; Ill. Const. 1970, art. I, sec. 2.) Therefore, the starting point in any procedural due process analysis is a

determination of whether one of those protectable intersts is present, for if there is not, no process is due." (*Polyvend, Inc.* v. *Puckorius* (1979), 77 Ill. 2d 287, 293-94, *appeal dismissed* (1980), ____ U.S. ____, 62 L. Ed. 2d 744, 100 S. Ct. 1001; see *Memphis Light, Gas & Water Division* v. *Craft* (1978), 436 U.S. 1, 9-10, 56 L. Ed. 2d, 30, 39, 98 S. Ct. 1554, 1560-61; *Board of Regents* v. *Roth* (1972), 408 U.S. 564, 569, 33 L. Ed. 2d 548, 556, 92 S. Ct. 2701, 2705; *Perry* v. *Sindermann* (1972), 408 U.S. 593, 599, 33 L. Ed. 2d 570, 578, 92 S. Ct. 2694, 2698.) Recognition of protected property interests requires an extraconstitutional inquiry into existing rules or provisions in State law. As the United States Supreme Court concluded in *Roth:*

> "Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law-rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." (408 U.S. 564, 577, 33 L. Ed. 2d 548, 561, 92 S. Ct. 2701, 2709.)

See *Memphis Light, Gas & Water Division* v. *Craft* (1978), 436 U.S. 1, 9, 56 L. Ed. 2d 30, 39, 98 S. Ct. 1554, 1560; *Goss* v. *Lopez* (1975), 419 U.S. 565, 572-73, 42 L. Ed. 2d 725, 733-34, 95 S. Ct. 729, 735; *Polyvend, Inc.* v. *Puckorius* (1979), 77 Ill. 2d 287, 294-95.

It has long been recognized in this State that a severed mineral interest is a freehold estate entitled to the customary incidents of ownership. (*Pickens* v. *Adams* (1955), 7 Ill. 2d 283; *Miller* v. *Ridgley* (1954), 2 Ill. 2d 223; *Jilek* v. *Chicago, Wilmington & Franklin Coal Co.* (1943), 382 Ill. 241.) This recognition, moreover, represents the position overwhelmingly embraced by other States. (*Wheelock* v. *Heath* (1978), 201 Neb. 835, 272 N.W.2d 768; *Chicago & North Western Transportation Co.* v. *Pedersen* (1977), 80 Wis. 2d 566, 259 N.W.2d 316; *Trustees of Tufts College* v. *Triple R. Ranch, Inc.* (Fla. 1973), 275 So. 2d

521; 1A W. Summers, Oil and Gas sec. 139 (1954); 54 Am. Jur. 2d *Mines and Minerals* sec. 116 (1971).) It is accordingly clear that the severed mineral interests here under consideration constitute protected property interests entitled to the procedural safeguards which due process requires.

The United States Supreme Court has emphasized that due process of law, at a minimum, prohibits the deprivation of property without providing notice and an opportunity for a hearing appropriate to the nature of the case. (*Memphis Light, Gas & Water Division* v. *Craft* (1978), 436 U.S. 1, 13-16, 56 L. Ed. 2d 30, 41-43, 98 S. Ct. 1554, 1562-63; *Mullane* v. *Central Hanover Trust Co.* (1950), 339 U.S. 306, 313, 94 L.Ed. 865, 872-73, 70 S. Ct. 652, 657.) While "the timing and content of the notice and the nature of the hearing will depend on appropriate accommodation of the competing interests involved" (*Goss* v. *Lopez* (1975), 419 U.S. 565, 579, 42 L. Ed. 2d 725, 737, 95 S. Ct. 729, 738-39, citing *Cafeteria Workers* v. *McElroy* (1961), 367 U.S. 866, 895, 6 L. Ed. 2d 1230, 1236, 81 S. CT. 1743, 1748; *Morrissey* v. *Brewer* (1972), 408 U.S. 471, 481, 33 L. Ed. 2d 484, 494, 92 S. Ct. 2593, 2600; see *Powell* v. *Jones* (1973), 56 Ill. 2d 70, 78), something more is necessary than is here provided.

The Act declares that any severed interest in oil and gas shall be deemed abandoned unless the record owner, within a period of 25 years, engages in the actual production of oil or gas, publicly exercises specified acts of ownership by means of instruments recorded in the office of the recorder of deeds for the county wherein the interest is located, or files with the county recorder a written claim of interest within 3 years after the effective date of the Act or within 25 years from the last public act of ownership, whichever is later. If a written claim of interest is recorded, ownership of the interest is preserved only for the next 25 years. In the absence of one of the required acts, a statutory abandonment occurs and the severed interests automatically vest in the surface owners.

The statute provides no notice of any kind to record owners of oil and gas interests that they must record a statement of their interest in order to prevent the forfeiture of their property interests. While we recognize the beneficial purpose of the statute to facilitate the production of existing oil, gas and other mineral resources, particularly where ownership of the interests has become increasingly fractionalized and scattered, the record owners are vested with property interests entitled to the procedural safeguards of due process. Failure to provide those owners with adequate notice and an opportunity to be heard renders the statutory scheme unconstitutional.

When faced with similar statutes, the courts in other States have reached like conclusions. In *Wheelock* v. *Heath* (1978), 201 Neb. 835, 272 N.W.2d 768, the statute declared that severed mineral interests would be deemed abandoned unless the record owner publicly exercised defined ownership rights within a period of 23 years or asserted his interest in an action filed within 2 years after the effective date of the statute. In *Chicago & North Western Transportation Co.* v. *Pedersen* (1977), 80 Wis. 2d 566, 259 N.W.2d 316, the statute provided for the reversion of severed mineral interests to the surface fee owner unless the owner of the mineral interests registered his ownership and paid an annual registration fee. In *Contos* v. *Herbst* (Minn. 1979), 278 N.W.2d 732, the statute provided for the forfeiture of severed mineral interests to the State unless the record owner filed a registration statement. In both *Wheelock* and *Pedersen*, the forfeiture occurred without any notice, hearing or compensation to the record owner. The statute in *Contos* provided for notice by publication in a legal newspaper within each county, apparently in three issues, and in two mining publications with a nationwide circulation, and it provided for compensation following forfeiture. The court, however, found that notice by publication of the statutes alone was inadequate and concluded: "We cannot imagine a more clear violation of due process than the failure to provide a hearing before forfeiture." 278 N.W.2d

732, 743, citing *Mullane* v. *Central Hanover Bank & Trust Co.* (1949), 339 U.S. 306, 94 L. Ed. 865, 70 S. Ct. 652.

In *Short* v. *Texaco, Inc.* (1980),—Ind.—, 406 N.E.2d 625, however, the Indiana Supreme Court upheld a statute that provided for the reversion of severed mineral interests to surface owners if, after 20 years, no specified acts of ownership had occurred or no claim of interest had been filed within two years after the effective date of the act. The court concluded that the statute comported with procedural due process upon finding that its enactment, along with the opportunity to prevent reversion of the mineral interest by filing a claim of interest, provided sufficient notice to affected owners. That court also appears to have found support for its conclusion in the fact that such owners would receive notice and an opportunity to be heard if a court should be called upon at some future time to determine whether the statutory conditions of mandatory reversion had occurred. We are unpersuaded by these reasons and others which analogized the statute to ordinary statutes of limitation. We, moreover, regard that court's reliance on *Anderson National Bank* v. *Luckett* (1944), 321 U.S. 233, 88 L. Ed. 692, 64 S. Ct. 599, as misplaced inasmuch as the aspect of the statutes there in question did not transfer or significantly affect an owner's rights to his property. The issue there before the court was the validity of a statutory provision requiring banks to file annually with the State a report of deposits dormant for specified numbers of years, a copy of which went to the local sheriff for posting on the courthouse door. The statute required the banks to then transfer custody of those funds to the State, from which the owner could thereafter reclaim them. The issue before the Supreme Court was "whether the procedure by which the state undertakes to acquire the depositors' right to demand payment of the deposits was upon adequate notice to them and opportunity for them to be heard." (321 U.S. 233, 243, 88 L. Ed. 692, 703, 64 S. Ct. 599, 604.) The court held due process requirements satisfied, emphasizing that the owners of

the transferred funds—the depositors—were not deprived of their property since they could reclaim it from the State at any time prior to, and for five years following, a judicial decree of abandonment the validity of which was neither questioned nor passed upon. Upholding a statutory provision for the transfer to the State, after posting notice, of the *custody* of dormant bank funds cannot, in our judgment, be viewed as authority for upholding the validity of a statute which transfers, with no notice, *ownership* of vested real property interests from one private party to another.

Plaintiff would have us validate the statute in question by construing it as a statute of limitations. A similar argument was rejected by the Minnesota Supreme Court in *Contos* v. *Herbst* (Minn. 1979), 278 N.W. 2d 732, 745, with respect to the statute there under consideration. It is fundamental that statutes of limitations are procedural in nature (see *Orlicki* v. *McCarthy* (1954), 4 Ill. 2d 342; *Hilberg* v. *Industrial Com.* (1942), 380 Ill. 102; see also *Kalmich* v. *Bruno* (7th Cir. 1977), 553 F.2d 549, *cert. denied* (1977), 434 U.S. 940, 54 L. Ed. 2d 300, 98 S. Ct. 432) and are not designed to alter substantive rights or convey property interests. The time limitations of the statute in question here, however, operate to transfer vested, freehold interests. Whether denominated a statute of limitations or otherwise, its operation is simply incompatible with the due process requirements earlier expressed.

The judgment of the circuit court of White County holding the Act unconstitutional is accordingly affirmed.

Judgment affirmed.

APPENDIX J

201 Neb. 835

James R. WHEELOCK, Appellee,

v.

Opal HEATH *et al.*, Appellants.

MANNING OO RANCHES,
INC., Appellee,

v.

Opal HEATH *et al.*, Appellants.

Nos. 42118, 42119.

Supreme Court of Nebraska.

Dec. 13, 1978.

SPENCER, Chief Justice, Pro Tem.

These actions are brought under sections 57-228 through 57-231, R.R.S.1943, to extinguish the severed mineral interests owned of record by the defendants, and to vest the title to them in the plaintiffs. The trial court canceled the interests and vested title in plaintiffs. The question presented is the constitutionality of the act as retroactively applied against these defendants. We reverse.

The statutory provisions pertinent herein, all of which became effective in 1967, are as follows:

Section 57-228, R.R.S.1943: "Any owner or owners of the surface of real estate from which a mineral interest has been severed, on behalf of himself and any other owners of such interest in the surface, may sue in equity in the county where such real estate, or some part thereof, is located, praying for the termination and extinguishment of such severed mineral interest and cancellation of the same of record, naming as parties defen-

dants therein all persons having or appearing to have any interest in such severed mineral interest, and if such parties defendant are not known and cannot be ascertained, they may be proceeded against as unknown defendants under the provisions of Chapter 25, article 3."

Section 57-229, R.R.S.1943: "A severed mineral interest shall be abandoned unless the record owner of such mineral interest has within the twenty-three acres immediately prior to the filing of the action provided for in sections 57-228 to 57-231, exercised publicly the right of ownership by (1) acquiring, selling, leasing, pooling, utilizing, mortgaging, encumbering, or transferring such interest or any part thereof by an instrument which is properly recorded in the county where the land from which such interest was severed is located; or (2) drilling or mining for, removing, producing, or withdrawing minerals from under the lands or using the geological formations, or spaces or cavities below the surface of the lands for any purpose consistent with the rights conveyed or reserved in the deed or other instrument which creates the severed mineral interest; or (3) recording a verified claim of interest in the county where the lands from which such interest is severed are located. Such a claim of interest shall describe the land and the nature of the interest claimed, shall properly identify the deed or other instrument under which the interest is claimed, shall give the name and address of the person or persons claiming the interest, and shall state that such person or persons claim the interest and do not intend to abandon the same. The interest of any such owner shall be extended for a period of twenty-three years from the date of any such acts; *Provided,* that the provisions of this section shall not apply to mineral interests of which the State of Nebraska or any of its political subdivisions is the record owner."

Section 57-230, R.R.S.1943: "If the court shall find that the severed mineral interest has been abandoned, it shall enter judgment terminating and extinguishing it, canceling it of record, and vesting the title thereto in the owner or owners of the in-

terest in the surface from which it was originally severed in the proportions in which they own such interest in the surface."

Section 57-231, R.R.S.1943: "In any action filed within two years after October 23, 1967, the owner of a severed mineral interest may enter his appearance and assert his interest therein, and he shall be deemed thereby to have timely and publicly exercised his right of ownership."

The parties stipulated that case No. 42118 and case No. 42119 should be consolidated for the purpose of submitting briefs and for oral argument. The only basic difference between the two cases is the real estate involved.

On May 29, 1950, George S. Manning, for valuable consideration, executed and delivered a mineral deed to R. W. Slemaker, conveying an undivided one-half interest in and to all oil, gas, and minerals that may be produced from over 3,000 acres of land in Grant County, Nebraska. Said mineral deed warranted the title of said mineral estate forever to the grantee, his heirs, successors, executors, personal representatives, and assigns.

R. W. Slemaker and wife for valuable consideration executed and delivered mineral deeds for fractional interests to the respective defendants herein, conveying undivided interests in and to all oil, gas, and minerals that may be produced from said land. Said mineral deed warranted the title to said mineral estates.

The plaintiffs, appellees herein, James R. Wheelock and Manning 00 Ranches, Inc., subsequently acquired title to the surface and one-half of the oil, gas, and minerals in different tracts of real estate through mesne conveyances of record from the original grantor, George S. Manning. The appellees, successors in interest to the original grantor, have now brought these actions to terminate and extinguish the mineral interests owned by the defendants-appellants.

There is no factual dispute in the cases. Plaintiffs are the surface owners of the real estate involved and they also own an undivided one-half interest in all the oil, gas, and other minerals underlying their respective tracts of land. Defendants acquired their mineral interests more than 23 years prior to the filing of the actions and had not taken any of the steps required by section 57-229, R.R.S.1943, to preserve their interests.

[1] We first meet the question as to whether the act was intended to apply retrospectively. A legislative act will operate only prospectively and not retrospectively, unless the legislative intent and purpose that it should operate retrospectively is clearly disclosed. *Retired City Civ. Emp. Club of Omaha* v. *City of Omaha Emp. Sys.*, 199 Neb. 507, 260 N.W.2d 472 (1977). It is obvious the Nebraska act was clearly intended to apply retrospectively, because it allows actions to be filed immediately after its effective date. Section 57-231, R.R.S.1943, provides: "In any action filed within two years after October 23, 1967 * * *." The act became effective October 23, 1967.

In considering the constitutionality of the retrospective application of the act, it is necessary to define the nature of the title to a severed mineral interest. As stated by E. Kuntz in Old and New Solutions to the Problem of the Outstanding Undeveloped Mineral Interest, 22 Oil & Gas Inst. 81, 97 (1971): "The concept (of abandonment in the statutes of Illinois, Michigan, and Nebraska) is necessarily predicated upon an assumption by the legislature that the nature of the title is such that it is capable of being abandoned. Whether or not this assumption is a valid one must be determined by the judicial process. Such determination, in turn, will require an appraisal or reappraisal of the basic theory of ownership adopted in the state and an appraisal or reappraisal of the basic legal principles regarding abandonment of title to real property."

[2] In *Farmers Canal Co.* v. *Frank*, 72 Neb. 136, 100 N.W. 286 (1904), the rule is stated that for abandonment to occur

there must be both a relinquishment of possession or nonuser of the right granted together with the intention to abandon. It is further stated in that opinion that mere absence from and nonuser of the property do not provide an intention to abandon, although conduct of that kind may continue unexplained for such length of time as not to be consistent with any other hypothesis. The statute, in effect, provides that failure to publicly exercise the right of ownership to a severed mineral interest for a period of 23 years conclusively establishes the intention to abandon. At common law, legal title to land could not be lost by abandonment. See *Tate* v. *Biggs,* 89 Neb. 195, 130 N.W. 1053 (1911).

[3] The general rule is stated in 54 Am. Jur.2d, Mines and Minerals, s. 116, p. 298, as follows: "When by appropriate conveyance the mineral estate in lands is severed from the surface, separate and distinct estates are thereby created which are held by separate and distinct titles, and each is a freehold estate of inheritance subject to the laws of descent, devise, and conveyance. The owners of the two estates do not become tenants in common, although, of course, the conveyance may be so worded as to constitute the purchasers of either estate such tenants.

"A grantee of the minerals underlying the land becomes the owner of them; his interest is not a mere mining privilege. The minerals thus severed become a separate corporeal hereditament. Their ownership is attended with all the attributes and incidents peculiar to ownership of land, and they may be embraced in the terms 'land' or 'real property' in a subsequent conveyance."

[4,5] There are numerous indications under Nebraska law that mineral interests are vested property rights. In *Pfeifer* v. *Ableidinger,* 166 Neb. 464, 89 N.W.2d 568 (1958), and in *Stoller* v. *State,* 171 Neb. 93, 105 N.W.2d 852 (1960), this court held that mineral interests in land are subject to the protection of the

due process clause. Section 77-103, R.R.S.1943, provides, so far as material herein: "The terms real property, real estate and lands shall include * * * minerals * * * mineral springs and wells, oil and gas wells, * * *." In *Fawn Lake Ranch Co.* v. *Cumbow*, 102 Neb. 288, 167 N.W. 75 (1918), this court said: "The removal of minerals, whether held in solution upon the land or resting in the soil and subsurface, is the removal of a component part of the real estate itself. The severance changes the character of the property but it remains real estate until detached." See, also, *Conway* v. *County of Adams*, 172 Neb. 94, 108 N.W.2d 637 (1961). Under section 25-2170, R.R.S.1943, mineral interests are subject to partition.

[6] In *Elrod* v. *Heirs, Devisees, Etc.*, 156 Neb. 269, 55 N.W.2d 673 (1952), Hattie Gifford conveyed a section of land "subject to and reserving to the grantor herein personally an undivided one-half (½) interest in and to all gas, oil or other minerals in, on or under said land herein conveyed." The appellants claimed that the reservation of the mineral estate was personal to the grantor and created only a life estate which terminated at grantor's death. This court in that case held "the conclusion is inescapable that Hattie Gifford by the terms of her deed to appellants retained a fee simple estate in one-half of the gas, oil, and other minerals in the land conveyed." It may be argued, however, that this case is not dispositive since the term "fee simple" merely indicated that the grantor retained an estate of inheritance rather than indicating the possessory or corporeal nature of the interest. We incline to the view, however, that when a mineral interest is conveyed, unless the instrument provides otherwise, an estate in fee simple in land or a corporeal hereditament is created.

[7] In Comment, Abandonment of Mineral Rights, 21 Stanford L.Rev. 1227 (1969), it is stated: "Interests in land, or hereditaments, have long been categorized by the common law

for certain purposes as either 'corporeal' or 'incorporeal.' For example, fee-simple ownership of a plot of land is considered ownership of a corporeal hereditament; the owner is deemed to 'own' a corporeal substance—the land. On the other hand, an easement is an example of an incorporeal hereditament. The holder of an easement does not 'own' any tangible substance; rather, he 'owns' the right to use portions of another's land for passage. * *

"While incorporeal hereditaments, such as easements, licenses, mining claims, and franchises, have uniformly been held subject to abandonment, a firmly established common law rule provides that a corporeal interest in land cannot be abandoned. Underlying this rule is the seldom-articulated but ancient policy disfavoring voids or gaps in the chain of title to land."

In *Fawn Lake Ranch Co.* v. *Cumbow, supra,* this court said: "In *Williamson* v. *Jones,* 39 W.Va. 231, 257, 19 S.E. 436, 441 (25 L.R.A. 222), upon the question whether mineral oil in place is part of the realty it was held that it was, and that its removal constituted waste, the court saying:

"'The courts of the state of Pennsylvania have had many cases, some involving property rights of great value, in which the point arose, and have examined the question thoroughly, considered it with great care with reference to its being property where it is found, and its character and nature as property in general. "Oil is a mineral, and, being a mineral, is part of the realty. *Frank* v. *Haldeman,* 53 Pa. 229. In that it is like coal or any other natural product which *in situ* forms part of the land, It may become, by severance, personalty, or there may be a right to use or take it, originating in custom or prescription, as the right of a life tenant to work open mines, or to use timber for repairing buildings or fences on a farm, or for fire-bote. Nevertheless, whenever conveyance is made of its, whether that conveyance be called a lease or deed, it is, in effect, the grant of

a part of the corpus of the estate, and not of a mere incorporeal right. Not infrequently the oil forms by far the most valuable part of the estate." ' "

Appellees direct our attention to *Hiddleston* v. *Nebraska Jewish Education Soc.*, 186 Neb. 786, 186 N.W.2d 904 (1971), in which we held: "Constitutionality of a retroactive statute under the contract and due process clauses [of the United States and the Nebraska Constitutions] generally depends upon reasonableness. Relevant factors are the nature and strength of the public interest, the extent of modification of the asserted preenactment right, and the nature of the right altered by the statute." In that case the extinguishment of possibilities of reverter after 30 years was held to be constitutional even though the statute operated retrospectively. The court there stated: "The value of possibilities of reverters as a class has been slight."

There is a vast difference between possibilities of reverter and the outright severance of a mineral interest for a consideration. It cannot be said that the value of mineral interests as a class has been slight. As suggested before, in the quotation from *Fawn Lake Ranch Co.* v. *Cumbow, supra,* the mineral interest may form the most valuable part of the land.

To date, the exact question involved herein has been considered by only one intermediate appellate court. In *Bickel* v. *Fairchild,* 83 Mich.App. 467, 268 N.W.2d 881 (1978), the Michigan Dormant Mineral Act was declared unconstitutional. The Act provided that a severed oil and gas interest would be deemed abandoned unless during any 20-year period the holder of the interest had secured period the holder of the interest had secured a drilling permit, produced oil or gas, transferred the interest, used the property for underground gas storage, or recorded a notice of interest. A 3-year grace period was provided by the Act, which became effective in 1963, for persons to record notice to preserve their interest.

The observations of that court are pertinent herein: "We agree with appellants that in our energy short and energy conscious generation, the legislative act has a real public purpose—to encourage exploration and drilling of new gas and oil wells. Some oil and gas rights, with the passage of time, have become fractionalized and distributed among numerous owners, many who are no longer locatable and perhaps even deceased. No oil company will spend the time and expense of tracing all the possible owners down in order to do expensive exploratory drilling with no guarantee of favorable results.

"On the other hand, the gas and oil interest holders have a property right given them by private publicly recorded contracts. These rights are subject to being sold, mortgaged, leased, devised or inherited just as the surface rights are. Whose rights are paramount, the state's or the individual's?"

Appellees refer to a Virginia case, *Love* v. *Lynchburg National Bank & Trust Co.*, 205 Va. 860, 140 S.E.2d 650 (1965), as supporting their position. It is true, in that case a statute extinguishing mineral interests was held to be constitutional. That case, however, is distinguishable. There, the statute merely created a presumption there were no minerals in the land if the claim was not exercised for 35 years. Further, the interest holder was permitted 6 months after being sued to discover minerals. The Virginia court determined the statute did not operate to divest any property rights. It merely provided a rule of evidence. If there were no minerals, there could be no mineral interest. The court also held the statute did not constitute special legislation, stating: "The legislation is general and impartial in its operation on all person and land similarly situated."

In the case before us, the statute deprives known property owners of their subsurface rights without notice, hearing, or compensation. The statute was passed in 1967. It declared the mineral rights shall have been abandoned unless the record owner had publicly exercised ownership rights, as defined in the

statute, within 23 years immediately prior to the filing of an action to cancel the severed mineral interest of record. No notice of any nature was given to the record owner of a mineral interest.

A limited statute of limitations was provided. In any action filed within 2 years after October 23, 1967, the owner of a severed mineral interest could enter an appearance and assert his interest. He would then be deemed to have timely and publicly exercised his right of ownership. In other words, the record title owners were required within 2 years from October 23, 1967, to take some affirmative action or lose their property. In all actions filed after October 23, 1969, if no affirmative action had been taken within 23 years, the severed interest is to be considered abandoned. The owner does not have any remedy. The statute, insofar as it attempts to operate retroactively, is unconstitutional as violative of the due process and contract clauses of the United States and the Nebraska Constitutions.

The judgment of the District Court is reversed and the cause remanded with direction to find sections 57-228, 57-229, 57-230, and 57-231, R.R.S.1943, unconstitutional insofar as those statutes may be interpreted to be retroactive in their operation.

REVERSED AND REMANDED WITH DIRECTIONS.